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No. _____

In The

Supreme Court of the United States

October Term, 1995

CITY AND COUNTY OF DENVER,

Petitioner,

v.

C. KELLY CARPENTER, ET AL.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are employees, who are otherwise exempt from the overtime requirement of the Fair Labor Standards Act, entitled to overtime compensation pursuant to 29 C.F.R. § 541.118(a) because their compensation may potentially be reduced?

2. Is the "window of correction" provided for by 29 C.F.R. § 541.118(a)(6) available for "reasons other than a lack of work"?

LIST OF PARTIES

The parties to this case are the Petitioner, the City and County of Denver, Colorado, and the Respondents, C. Kelly Carpenter, W. David Abrams, Steve R. Allison, L.H. Amman, William L. Aumiller, Edward B. Bingham, Donald G. Bowling, David Bricker, Richard W. Castricone, Edward A. Connors, Heather A. Coogan, Timothy J. Cuthriell, Vincent J. Dimanna, Gary J. Ellis, Donald L. Fink, Patrick L. Flynn, Gerald Frazzini, Brian D. Gallagher, Peter M. Garcia, Gary L. Graham, Thomas P. Haney Jr., Edward B. Hansen, Thomas J. Heath, Lyle D. Hesalroad, Robert T. Hilburn, Paul C. Kaiser, John F. Kilpatrick, Mary Beth Klee, Wayne Krieger, Thomas C. Lahey, Timothy W. Leary, James Leo, Gary J. Leuthauser, Raymond J. Libonati, Edward Lujan, Jr., David H. Lusk, Donald R. Maddock, Juan A. Maldonado, Steve C. Metros, John W. Mlinar, William R. Mohr, Paul L. Mueller, Patrick V. Mulhern, C. Douglas Noe, John O'Dell, Daniel J. O'Hayre, Michael T. O'Neill, Joseph G. Ortiz, Monte C. Patterson, James D. Ponzi, Bobby E. Reagan, Miriam Reed, Ernestine Rowe, R. Anthony Ryan, Dennis J. Salazar, Donald Saltzman, Tom Sanchez, Rudolf Sandoval, Daniel J. Sewald, Charles Smith, Robert B. Steely, Buckley T. Stewart, Robert L. Swanson, John C. Thompson, George F. Torsney, Marco K. Vasquez, Frank J. Vessa, Elizabeth Walter, John L. Weber, Thomas A. Wheeler, Gerald R. Whitman, Curtis D. Williams, Thomas F. Wood And Daniel D. Yount.

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The decision of the Tenth Circuit three member panel was issued on April 23, 1996 and is reported at 82 F.3d 353 (1996). A Petition for Rehearing was denied by the Tenth Circuit on May 21, 1996. The Order of the District Court is unpublished and is dated April 10, 1995. The opinions of the Tenth Circuit and District Court are produced in the Appendix.

JURISDICTION

The Tenth Circuit's decision and mandate were issued on April 23, 1996. The Tenth Circuit issued its order denying the Petition for Rehearing on May 21, 1996. This Court's jurisdiction to review the Tenth Circuit's decision and judgment arises under 28 U.S.C. § 1254(1).

PERTINENT STATUTES, REGULATIONS, AND ORDINANCES

29 U.S.C. §§ 203(e)(1) and (e)(2)(C); 206(a)(1), 207(a)(1); 207(k); and 213(a)(1)

29 C.F.R. §§ 541.1; 541.5d; 541.118(a); and 553.230(b)

56 Fed. Reg. 45824, 45825, and 45828

57 Fed. Reg. 37666

Administrative Letter Ruling, Department of Labor Wage and Hour Division, December 24, 1991

Denver Revised Municipal Code §§ 42-28 and 42-63(b)(1)

The pertinent text of the above referenced authorities is set out in the Appendix.

STATEMENT OF THE CASE

On April 10, 1995, the United States District Court for the District of Colorado issued its Judgment of Dismissal, granting the City and County of Denver's Motion for Summary Judgment and denying the Plaintiff's Motion for Partial Summary Judgment. Appendix, A21. The Judgment of Dismissal incorporated by reference the oral conclusions of law of the District Court. Appendix, A23 to A27. The District Court followed the reasoning of the Fifth, Eighth and Eleventh United States Courts of Appeals, and held that because the salaries of the plaintiffs were only potentially subject to docking, and had not actually been docked, the plaintiffs remained exempt employees within the meaning of 29 C.F.R. § 541.118. *Id.*

In its opinion of April 23, 1996, 82 F.3d 353 (1996) a three judge panel of the Tenth Circuit Court of Appeals reversed the District Court's grant of summary judgment and ordered judgment in favor of the plaintiffs. Appendix, A1. The Tenth Circuit held that pursuant to 29 C.F.R.§ 541.118(a) the plaintiffs, who are lieutenants, captains, and division chiefs in the Denver Police Department, were not salaried employees exempt from the overtime requirement of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207(k), finding their salaries were "subject to reduction". The Tenth Circuit stated that "the

City's punishing an errant officer by removing leave time from the officer's leave repository creates the potential for reducing pay." 82 F.3d at 359, Appendix, A14. The Court of Appeals concluded, "When leave is exhausted, the record makes clear a plaintiff's salary is 'subject to reduction' ", and thus, "the quality of the officer's work may ultimately reduce the predetermined amount of salary the officer receives." *Id.*

The Court thus held:

> Because we read the language of the regulation to mean what it says, that the possibility of reduction defeats salaried status, we conclude plaintiffs are not exempt from the FLSA's overtime requirement.

82 F.3d at 354-355, Appendix A2. The Tenth Circuit rejected the argument of the City and County of Denver ("Denver") that because none of the plaintiffs had ever had their salaries reduced, their salaries were not "subject to reduction". The Court held:

> That the City has never, in fact, reduced a plaintiff's salary is not cognizable under § 541.118(a). Its express policy in § 42-28 of the Denver Code authorizes the Manager of Safety to collect . . . or cause to be withheld from any amount that is or may become due such person.' That is the actual policy whether it is administered that way or differently.

Id. at 360.

The Tenth Circuit stated that its decision was consistent with the general definition of a salaried employee as being paid "a predetermined amount unaffected by quality or quantity of work." *Id.* at 359.

The Court of Appeals further found that Denver's rules upon which discipline was based, were not "safety rules of major significance" within the meaning of 29 C.F.R. § 541.118(a)(5). *Id.* at 360.

Noting that the plaintiffs had only raised the salary test in their Complaint, but had not conceded that Denver met the duties test, the Tenth Circuit found that given the state of the record, the salary test was "dispositive." *Id.* at 356, n.1[1]

Federal jurisdiction in the United States District Court was pursuant to 28 U.S.C. §§ 1331, 1337, 1367, and 2201 and 29 U.S.C § 216(b).

REASONS FOR GRANTING CERTIORARI

I. THIS COURT HAS NOT SETTLED THE QUESTION, AND THE COURTS OF APPEALS ARE IN CONFLICT, AS TO WHETHER, PURSUANT TO 29 C.F.R. § 541.118(a), EMPLOYEES, WHO ARE OTHERWISE EXEMPT FROM THE OVERTIME REQUIREMENT OF THE FAIR LABOR STANDARDS ACT, ARE ENTITLED TO PAYMENT FOR OVERTIME BECAUSE THEIR COMPENSATION MAY ONLY POSSIBLY BE REDUCED

Public employers are faced with a variety of interpretations by the Courts of Appeals of the "salary basis"

[1] The Court stated it did not discuss the plaintiffs' allegations about military leave and jury duty, because its discussion of Denver's administration of its disciplinary rules disposed of the salary basis issues. *Id.* at 356.

test, set out in 29 C.F.R. § 541.118(a) (Appendix, A38), as to when or if otherwise exempt employees will be entitled to overtime compensation. Thus, identical policies may subject public employers to substantial liability, or to no liability, for the payment of overtime to classes of otherwise exempt employees, purely depending upon which Court of Appeal's interpretation they are subject to. This issue is thus an important question of Federal law that has not been, but should be, settled by this Court.

Denver contends that the Tenth Circuit's ruling, which awards public employees overtime payments purely based upon an abstract possibility that their pay could be docked, is contrary to the applicable regulations and results in an undeserved and expensive "windfall". *See Kuchinskas v. Broward County*, 840 F.Supp. 1548, 1557 (S.D. Fla. 1993).

In general, all employers, including state and local governments, are required to pay their employees a minimum wage. Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 203(e)(1) and (e)(2)(C); 29 U.S.C. § 206(a)(1); Appendix, A30 and A31. Hours worked in excess of forty in a week must generally be compensated at a rate of time and one-half. 29 U.S.C. § 207(a)(1). *Id.* at A32. Police officers are exempt from the requirement of receiving overtime for hours worked in excess of forty pursuant to 29 U.S.C. § 207(k), which requires overtime payment for tours of duty in work periods of twenty-eight (28) consecutive days only after 171 hours have been worked. *Id.* at A33. *See also* 29 C.F.R. § 553.230(b), Appendix, A41.

Pursuant to 29 U.S.C. § 213(a)(1) overtime pay is inapplicable to "any employee employed in a bona fide

executive, administrative, or professional capacity . . . " *Id.* at A34. The United States Department of Labor promulgated its "short test" at 29 C.F.R. § 541.1 defining the statutory terminology "employee employed in a bona fide executive . . . capacity". *Id.* at A35. Pursuant to 29 C.F.R. § 541.1(f), such employees are defined as compensated for their services on a "salary basis". At 29 C.F.R. § 541.118(a) the Department of Labor defined the term:

> (a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of the variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any work week in which he performs no work.

Id. at A38.

The primary issue in the present case is the definition of the language used in 29 C.F.R. § 541.118, "subject to reduction because of variations in the quality or quantity of the work performed". The Courts of Appeals have split in interpreting this language. In the present case the Tenth Circuit ruled that "subject to" means "the possibility and not the actuality of a reduction in pay." *Carpenter v. City and County of Denver, Colorado*, 82 F.3d 353, 359

(10th Cir. 1996). Some other Courts of Appeals have held likewise. *See Bankston v. State of Ill.*, 60 F.3d 1249 (7th Cir. 1995); *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993); *Klein v. Rush-Presbyterian-St. Luke's Medical Ctr.*, 990 F.2d 279, 286 (7th Cir. 1993); *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991).

Based upon the language of 29 C.F.R. § 541.118(a) and the Department of Labor's interpretations of its regulations, Denver contends that the interpretation of those Courts of Appeals, which have held that only an actual deduction from salary defeats an employee's exempt status, should be adopted by this Court. *See Barner v. City of Novato*, 17 F.3d 1256 (9th Cir. 1994); *McDonnell v. City of Omaha, Nebraska*, 999 F.2d 293, 297 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 1188 (1994); *York v. Wichita Falls*, 944 F.2d 236, 242 (5th Cir. 1991); *Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 300, 805 (11th Cir. 1991).

Denver classified the plaintiffs as within the executive exemption. Section 42-63(b)(1) of the Denver Municipal Code provided that the plaintiffs were exempt from overtime, and ineligible for time and one-half for overtime worked. Appendix, A69. As exempt employees the plaintiffs were only eligible to receive straight time overtime compensation. Section 42-28 of the Denver Municipal Code provides the Manager of Safety with the power to "fine" any police officer for "misconduct or breach of discipline or violation" of the police department's rules and to "collect the same or cause it to be withheld from any amount that is or may become due such person". *Id.* at A68.

However, as confirmed by the Tenth Circuit's decision, no plaintiff's salary has ever been reduced (82 F.2d at 360), and only leave taken from accumulated leave banks was used as a "fine". *Id.* at 350. It is also significant that Denver had no express policy of deducting pay from the plaintiffs' salaries.

The language of 29 C.F.R. § 541.118 confirms that actual reductions in salary are required for salary "to be subject to reduction". Denver contends that the "amount . . . not subject to reduction" discussed in 29 C.F.R. § 541.118 refers to the amount of compensation referenced in the language "if . . . he regularly receives each pay period . . . a predetermined amount, constituting all or part of his compensation", found in the same sentence. Thus, the regulation only encompasses an actual reduction in salary or compensation, rather than leave, and not a potential reduction in salary or compensation. It is undisputed that the plaintiffs met the requirement of the regulation and each pay period received an undiminished and predetermined amount of salary. In *Barner v. City of Novato*, 17 F.3d at 1261-62, the Ninth Circuit specifically held that the word "amount" in 29 C.F.R. § 541.118(a) refers to "cash or salary", and therefore a reduction in paid leave time did not alter the plaintiff's status as salaried employees.

The next sentence of § 541.118 further confirms that the exclusive focus of the regulation is a reduction in salary. It provides that subject to certain specified exceptions, an employee "must receive his full salary for any week in which he performs any work . . . " Again, in the present case it is undisputed that the plaintiffs did receive their full salaries.

29 C.F.R. § 541.118(a)(1) also only excludes employees from being considered compensated on a "salary basis", if deductions are actually made from their "predetermined compensation" for absences occasioned by the employer. Similarly, 29 C.F.R. § 541.118(a)(5), which provides an exception to the general rule set out in § 541.118(a), requires the actual, rather than potential, imposition of penalties, stating: "Penalties *imposed* in good faith for infractions of safety rules of major significance will not affect the employee's salaried status . . . " (Emphasis added.)

29 C.F.R.§ 541.118(a)(6), which is discussed in detail in Section II below, also is limited to actual, rather than potential, deductions of salary, permitting employers a "window of correction" for deductions not permitted by the regulations, which are either "inadvertent" or "made for reasons other than a lack of work".

Thus, Denver contends that the Tenth Circuit's decision in fact does not "read the language of the regulation to mean what it says" (82 F.2d at 344). In addition, that Court's interpretation of the regulation produces an anomalous and unjust result. Actual and impermissible deductions in salary may, under the appropriate circumstances set forth in § 541.118(a)(6), be subject to a "window of correction" whereby the exemption is preserved. However, pursuant to the Tenth Circuit's decision, potential deductions in salary, which may never occur, would not have the benefit of the window of correction, resulting in the expensive loss of the exemption.

Two Courts of Appeals have provided their interpretations of 29 C.F.R. § 541.5d (56 Fed. Reg. 45824, 45825,

45828; 57 Fed. Reg. 37666; Appendix, A37, A42-A65), which was adopted by the Department of Labor in response to the *Abshire* ruling in order to relieve public employers of the obligation to pay their exempt employees a full salary even if they were absent from work for less than one day for personal reasons and did not use leave time to account for the absence. *Shockley v. City of Newport News*, 997 F.2d 18, 22 (4th Cir. 1993), involved a city policy of disciplinary suspensions and pay reductions for part day and unauthorized absences. The Fourth Circuit found that the City's policy prior to the Department of Labor's promulgation of 29 C.F.R. § 541.5d on September 6, 1991, violated the salary basis test. However, for the period from September 6, 1991 to the present, the Fourth Circuit concluded that 29 C.F.R. § 541.5d permitted public agencies to place an employee on leave without pay for absences for personal reasons when accrued leave was not used by the employee. The Court noted that the regulation permitted employers to reduce their employees' pay for partial full day absences for personal reasons. It held that "the regulation expressly authorizes suspensions without pay as a disciplinary sanction for public employees, who are absent without leave." *Id.* at 25.

In *Service Employees International Union, Local 102 v. County of San Diego*, 35 F.3d 483 (9th Cir. 1994), the Ninth Circuit held that the salary test of 29 C.F.R. § 541.118 (a), as it existed before the Department of Labor suspended its application to public employers on September 6, 1991 (Appendix, A42 to A65), was invalid in its entirety as applied to those employers. The Court reasoned that by making the Fair Labor Standards Act applicable to the

public sector, Congress intended that the administrative and executive exemptions should apply to the public sector. *Id.* at 1352. However, public employers, being constrained by pay systems based on public accountability, could not pay public employees for time not worked and thus could not satisfy the salary test as it existed before September 6, 1991. *Id.* Therefore, because they could not satisfy the salary test, public employees could not qualify for the executive and administrative exemptions. *Id.* at 1353. The Court thus concluded that the salary test prior to September 6, 1991 "conflicted with congressional intent that public sector employees be able to claim the administrative and executive exemption." *Id.*

Denver contends that the interpretation it advocates, which the Fifth, Eighth, and Eleventh Circuits previously adopted, of the terminology "subject to reduction" comports with the intent of Congress, that administrative and executive public employees qualify for exemption from the FLSA's overtime requirement. Thus, the interpretation of "subject to reduction" as requiring an actual reduction in pay, does not require the conclusion, reached by the Ninth Circuit in *Service Employees International Union, Local 102*, that the salary test before September 6, 1991 was invalid. However, Denver contends that adoption of the Tenth Circuit's decision in *Carpenter* requires the same determination as made in *Service Employees International Union, Local 102*, that the prior version of the salary test be held invalid.

Although the Tenth Circuit purported to give the Department of Labor's interpretations of its rules "substantial deference", it ignored the Department's own interpretations which determined that even occasional

and actual deductions from salary would result only in a loss of exempt status for the week of the deduction. As discussed at 57 Fed. Reg. 37669, two Wage and Hour opinion letters provided that an occasional docking of employee salary by a public entity, after available leave was exhausted, should only result in a loss of the exemption for the employee whose pay was docked and only for the work week in which the deduction occurred. An unpublished January 15, 1986 opinion letter of the Wage and Hour Administration stated that "[w]here an occasional deduction that is not permitted by § 541.118 is made from the salary of an otherwise exempt employee, the exemption would be lost in that work week when the deduction was made." *Id.* A July 17, 1987 opinion letter, which concerned "losing the exemption for that week" also stated:

> "[i]t is our opinion that, although the employee would be considered a nonexempt employee during those weeks when paid an hourly rate, it would not affect the employee's exempt status in other weeks when the employee is paid on a salary basis."

Id.

Similarly, in a December 24, 1991 Opinion Letter, (Appendix, A66) the Wage and Hour Administrator was asked concerning the effect of disciplinary deductions under 29 C.F.R. § 541.118(a)(6). The Opinion Letter concerned the effect of actual deductions and stated:

> The effect of making impermissible disciplinary deductions from "salaried" employees is discussed in § 541.118(6).[sic] Where a one-time disciplinary deduction is made, the exemption

> will not be considered to have been lost in all work-weeks if the employer reimburses the employee for such deduction and agrees to not take any such impermissible deduction in the future. Where disciplinary deductions not permitted by the Regulations occur on a regular and recurring basis (e.g., because of an employer's policy), we would question whether such employees, including all of those in the "class" or "category" of employees affected by such deductions, are actually paid on a salary basis and the exemption may be denied in all workweeks. (Emphasis in original.)

Thus, the Department of Labor has concluded that occasional and actual salary reductions do not permanently change an exempt employee's status. In contrast, the Tenth Circuit's decision apparently would require a complete loss of exempt status despite the fact that no reduction in salary occurred.

The Eighth and Eleventh Circuits have ruled that an actual reduction in pay is necessary for an employee to lose exempt status under the "salary basis" test. In *McDonnell v. City of Omaha*, the Eighth Circuit held, that because the salaries of assistant fire chiefs could only be reduced for part days missed if they had no remaining accumulated paid leave time, such a "contingent deduction in pay" did not alter their salaried status. (*Id.* at 296.) The Court stated:

> We did not read the 'subject to' language of the regulations, to mean that a 'possible' or 'contingent' reduction in salary automatically means that pay is 'subject to reduction' . . .

Id. at 297. It observed that the policy was one of "leave offsetting leave." *Id.*

The Eighth Circuit stated that it was not persuaded by the Ninth Circuit's approach in *Abshire*, noting:

> The letter ruling quoted in *Abshire* and relied on by the district court states only that deductions from pay for absences of less than a day are inconsistent with Section 541.118.

Id. at 297.

The Eighth Circuit's decision was also premised in part upon the Wage and Hour Division's adoption in 1987 of a non-enforcement policy for public employers who used accumulated leave time to offset short absences. *Id.* The Eighth Circuit noted that the Division's January 9, 1987 and July 17, 1989 letter rulings also permitted, without loss of exempt status, an exempt employee's pay to be reduced for short absences when the employee's available leave was exhausted, and allowed an employer to require an employee to substitute paid leave for absences for collective bargaining. *Id.* The Eighth Circuit specifically stated it found the Department of Labor's letter rulings to be "persuasive". *Id.* Those interpretations were also apparently not considered by the Tenth Circuit.

In *McDonnell* the Court also criticized the Ninth Circuit's "strict interpretation" of the salary basis test announced in *Abshire* for failing to consider the differences between employees in the public and private sectors, and noted that the salary basis test was promulgated "long before the FLSA applied to public employees." *Id.*

In *Atlantic Professional Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 800 (11th Cir. 1991), the Eleventh Circuit employed an analysis similar to that of the Eighth Circuit. Although a city ordinance required that all employees' compensation be decreased for late arrivals or other rules violations, the Court noted that no evidence had been presented that any captain had ever received a reduction in pay for such reasons. The Eleventh Circuit therefore held that Atlanta had demonstrated that "a captain's pay is not subject to reduction because of the quality or quantity of work." *Id.* at 805.

Similarly, in *York v. Wichita Falls*, 944 F.2d 236 (5th Cir. 1991), the city's affidavit in support of its motion for summary judgment stated there was no policy of docking the pay of its salaried employees. In addition the plaintiff fire fighters produced no evidence that pay had ever been reduced for sick or vacation leave. Thus, the Court ruled that the use of accrued sick or vacation leave for absences of less than a day did not alter the fire fighters' salaried status.

In *Barner v. City of Novato*, the Ninth Circuit announced a narrow interpretation of its prior decision in *Abshire*, holding that the exemption from overtime pay was lost when a local government had an express policy of deducting from its employees' pay absences of less than one day. *Barner*, 17 F.3d at 1258. As discussed above, Denver had no express policy of docking the salary of its exempt command police officers.

The Court in *Barner* also held that the possibility that the plaintiffs' salaries might be reduced, did not alter their status to that of hourly employees. *Id.* at 1262. The

Court further held that reducing accrued paid leave for absences of less than one day did not result in the plaintiffs being hourly employees. *Id.* at 1259, 1261.

Denver contends that the Tenth Circuit's *Carpenter* decision is in conflict with its decision in *Aaron v. City of Wichita, Ks.*, 54 F.3d 652 (10th Cir. 1995). In *Aaron* the Tenth Circuit reversed the district court's holding "that because the City had a policy requiring that absences of less than a day be charged against accrued leave, the employees could not be considered salaried." *Id.* at 658. The *Aaron* Court discussed the split between the circuits, and declined to adopt either interpretation:

> because even the circuits requiring less than actual docking to preclude exemption, require an *express* policy that an employee's actual pay will be reduced in the event that accrued leave is exhausted. (Emphasis in original.)

Id. Like the present case the Tenth Circuit noted that only the accrued leave of the employees in question had been affected, and that they had never had their pay docked. In addition no express policy of docking pay existed. The Tenth Circuit thus concluded that "under either line of cases above, the City's policy of docking paid leave does not preclude salary status as a matter of law." *Id.*

Finally, although in *Carpenter* the Tenth Circuit relied upon the Sixth Circuit's decision in *Michigan Ass'n of Gov. Emp. v. Michigan Dept. of Corr.*, 992 F.2d 82, 86 (6th Cir. 1993) for its holding that the actual policy of the city must be held against it "whether it is administered that way or differently" (*Carpenter*, 82 F.3d at 360), in actuality the Sixth Circuit held that the execution of a pay deduction

policy could be relevant. In the present case, Denver's execution of its policy of "fining" officers pursuant to the Municipal Code, never resulted in a loss of salary to the plaintiffs.

II. THIS COURT HAS NOT SETTLED THE QUESTION, AND THE COURTS OF APPEALS ARE IN CONFLICT, AS TO WHETHER THE "WINDOW OF CORRECTION" PROVIDED FOR BY 29 C.F.R. § 541.118(a)(6) IS AVAILABLE FOR "REASONS OTHER THAN A LACK OF WORK"

The Tenth Circuit failed to consider Denver's contention that 29 C.F.R. § 541.118(a)(6), (Appendix, A40) the "window of correction" provision of the Department of Labor's regulations was applicable. The regulation provides that loss of exempt status is not automatic, stating in part, "[T]he effect of making a deduction which is not permitted under these interpretations will depend upon the facts of the particular case."

In the present case the specific language which provides for a "window of correction" should have been held applicable. 29 C.F.R. § 541.118(a)(6) provides in relevant part:

> On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered lost if the employer reimburses the employee for such deduction and promises to comply in the future.

Appendix, A40.

As discussed above, because the rule clearly pertains to an actual, rather than potential deduction for disciplinary or other reasons, should a deduction in the future actually be made by Denver from the salaries of any of the plaintiffs, such deduction would be for reasons "other than lack of work". Thus, at that time Denver would be able to avail itself of the "window of correction," and the exemption would not be lost if, pursuant to the rule, the employee was reimbursed and Denver promised to "comply in the future."

However, if Denver, by only making deductions from the plaintiffs' accumulated leave banks, is determined to have made a deduction not permitted by 29 C.F.R. § 541.118, the "window of correction" would still be available because its deductions were inadvertent and "made for reasons other than lack of work". With the split of authority in the Courts of Appeals and the Tenth Circuit's conflicting rulings in *Aaron* and *Carpenter*, Denver's deductions would arguably be "inadvertent". Its deductions would clearly, however, be "made for reasons other than lack of work." Because it has made no salary deductions, no "reimbursement" would be possible, but Denver would be required to "promise to comply in the future".

The Department of Labor Wage and Hour Administrative Opinion letter of December 24, 1991 (Appendix, A66) discussed above, specifically addresses disciplinary deductions under 29 C.F.R. § 541.118(a)(6). It stated that the effect of making "impermissible disciplinary deductions from 'salaried' employees is discussed in § 541.118(a)(6)." *Id.* The letter discussed only one-time disciplinary deductions which were actually made, and

concluded that the exemption would not be last "in all work-weeks if the employer reimbursed the employee for such deduction and agrees to not to take any such impermissible deductions in the future." *Id.*

Although some courts, including the Seventh Circuit in its opinion in *Klein v. Rush-Presbyterian-St. Luke's Medical Ctr.*, have held the language "inadvertent, or is made for reasons other than lack of work" is in the conjunctive, the plain language of the rule is clearly disjunctive. In *Auer v. Robbins*, 65 F.3d 702 (8th Cir. 1995), the Eighth Circuit announced an interpretation of 29 C.F.R. § 541.118(a)(6) consistent with the Opinion Letter of December 24, 1991. *Auer* involved the City of St. Louis' imposition of a two day pay deduction on one police sergeant for violating the city residency requirement. Noting that the residency requirement was not a "major safety rule" within the meaning of § 541.118(a)(5), the Court observed that the two day pay deduction "arguably" would require the sergeant to be treated as nonsalaried. *Id.* at 710. However, the Eighth Circuit held that "a one-time deduction . . . does not automatically require the determination that all sergeants are nonsalaried." *Id.* The Court stated that the window of correction "allows employers to treat otherwise eligible employees as salaried, regardless of the employer's one time or unintentional failure to adhere to § 541.118(a)'s requirements." *Id.* at 711. (Citation omitted.) The Court observed, however, that the window of correction was unavailable if an employer had "a settled policy of making improper deductions from compensation." *Id.*

The Court in *Auer* expressly held that the sergeant's one time incident, "[F]its within the 'window of correction's' express requirement that the deduction be 'for reasons other than for lack of work' because it was imposed as a disciplinary measure". *Id.* Thus, citing 29 C.F.R. § 541.118(a)(6), the Eighth Circuit concluded that, "the regulations simply require the employer to reimburse the employee for the lost wages." *Id.*

Similarly, in *Lee v. Flight Safety Business Services Corp.*, 20 F.3d 428 (11th Cir. 1994), the Eleventh Circuit rejected a contention that the window of correction was available only for inadvertent errors, finding that such an argument "misread" the regulations. *Id.* at 433. Stating that the regulation "is clearly written in the disjunctive, so either circumstance suffices", the Court held:

> The window is available "where a deduction not permitted by these interpretations is inadvertent" *or* "is made for reasons other than lack of work." (Emphasis in original).

Id.

CONCLUSION

The instant case offers the Court an opportunity to settle two related issues which have divided the Courts of Appeals. The decision of the Tenth Circuit (and other circuits) that potential deductions in salary, which may never occur, defeat the salaried status of otherwise exempt employees should be reversed. The Tenth Circuit's decision is both contrary to the plain language of 29

C.F.R. § 541.118 (a), and the interpretations of that regulation by the United States Department of Labor. The result of the Tenth Circuit's interpretation is unjust. While actual impermissible reductions in salary may be corrected and preserve the exemption pursuant to 29 C.F.R. § 541.118(a)(6), potential deductions result in the loss of the exemption without any chance for correction.

It is requested that this Petition be granted.

Respectfully submitted this 27th day of June, 1996.

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

C. KELLY CARPENTER, ET AL.,)
Plaintiffs-Appellants,)
v.)
CITY & COUNTY OF DENVER, COLORADO,)
Defendant-Appellee.)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 93-Z-2513)

(Filed Apr. 23, 1996)

Thomas B. Buescher, Brauer, Buescher, Valentine, Goldhammer & Kelman, P.C., Denver, Colorado, for Plaintiffs-Appellants.

Darlene M. Ebert, Assistant City Attorney (Daniel E. Muse, City Attorney, and Michelle M. Lucero, Assistant City Attorney, with her on the brief), Denver, Colorado, for Defendant-Appellee.

Before **PORFILIO, BARRETT,** AND **LUCERO, Circuit Judges.**

PORFILIO, Circuit Judge.

In this appeal, we are asked to decide whether plaintiffs, lieutenants, captains, and division chiefs in the Denver Police Department, are salaried employees exempt from the overtime requirement of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207. This resolution pivots on our reading of 29 C.F.R. § 541.118(a), which states an employee whose salary is "subject to reduction because of variations in the quality or quantity of the work performed," is not exempt from payment of overtime. Because we read the language of the regulation to mean what it says, that the possibility of reduction defeats salaried status, we conclude plaintiffs are not exempt from the FLSA's overtime requirement. We reverse.

I.

Generally, the FLSA requires all employers, including state and local governments, to pay their employees a minimum wage for a 40-hour work week. 29 U.S.C. § 206. Hours worked over the 40-hour week must be compensated at an overtime rate of time and a half. 29 U.S.C. § 207. However, under 29 U.S.C. § 213(a)(1), payment of overtime does not apply to "any employee employed in a bona fide executive, administrative, or professional capacity. . . . " Congress delegated fleshing out this status

to the Department of Labor (DOL), which devised a "short test" in 29 C.F.R. § 541.1, providing:

> The term *"employee employed in a bona fide executive * * * capacity* . . . shall mean any employee:
>
> (a) Whose primary duty consists of the management of the enterprise in which he is employed. . . .
>
> (b) Who customarily and regularly directs the work of two or more other employees therein; and
>
> (c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and
>
> (d) Who customarily and regularly exercises discretionary powers; and
>
> (e) Who does not devote more than 20 percent . . . of his hours of work in the workweek to activities which are not directly or closely related to the performance of the work described in paragraphs (a) through (d) . . . ; and
>
> (f) Who is compensated for his services on a salary basis at a rate of not less than . . . $250 per week . . . and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section."

Because Congress expressly delegated supplying the definitions for its statutory scheme to DOL without accompanying guidance, the scope of our judicial review of those terms that constitute the exemption is quite narrow. Moreover, that review endows the agency's interpretation with substantial deference.

The employer bears the burden of showing "the employee fits 'plainly and unmistakenly within the exemption's terms' – under both the 'salary' test and the 'duties' test." ***Aaron v. City of Wichita, Kan.***, 54 F.3d 652, 657 (10th Cir.), cert. denied, 116 S.Ct. 419 (1995), (quoting ***Reich v. State of Wyoming,*** 993 F.2d 739, 741 (10th Cir.1993)). Narrowly construing the exemption furthers the congressional goal in the FLSA to provide broad federal employment protection "to the furthest reaches consistent with congressional direction." ***Mitchell v. Lublin, McGaughy & Assocs.***, 358 U.S. 207, 211 (1959).

The Denver Revised Municipal Code reflects the FLSA design in § 42-63(b), which provides that members of the classified service of the police department shall receive time and a half for overtime hours. However, § 42-63(b)(1) states:

> The provisions of this paragraph (b) shall not apply to police officers determined to be exempt from the Fair Labor Standards Act and who hold the rank of lieutenants of police, superintendent of radio engineers, division chief or captains of police, as fixed by Charter provision.

Exempt employees receive straight-time overtime compensation. The City classifies plaintiffs as falling within the executive exemption.

Challenging this status, plaintiffs sued the City for declaratory relief, contending they are not exempt from coverage of the FLSA overtime requirements and seeking back pay for each hour of overtime worked at time and a half for approximately three years from 1990 through 1993, in addition to liquidated damages authorized by the FLSA. Their complaint attacked their exempt status solely on the basis of the salary test, alleging the City's practice of fining certain plaintiffs for violations of minor safety rules and docking pay for military leave after 15 days defeated its claim to the exemption.[1] The City responded the executive, administrative, and professional exemptions barred plaintiffs' claims. The parties filed cross-motions for summary judgment, each side offering countervailing affidavits, plaintiffs' showing their salaries were "subject to" reduction when they are disciplined; and the City's contending that while compensatory leave time may be deducted from a plaintiff's leave bank, no actual deductions have ever been made from a plaintiff's salary.

Finding no factual issues in dispute, the district court concluded plaintiffs are exempt employees, rejecting the Second, Seventh, and District of Columbia Circuits' interpretation of § 541.118(a), and aligning itself with the Eighth, Eleventh, and Fifth Circuits which hold that

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[1] While the employer must satisfy both the duties test and the salary test, as noted, plaintiffs raised only the salary test in their complaint. Although plaintiffs do not concede the employer has satisfied the duties test and contend on appeal the district court failed to make factual findings about plaintiffs' duties, given the state of the record before us, the salary test remains dispositive.

absent an actual deduction from salary, the practice of offsetting leave with leave will not defeat an employee's exempt status. ***McDonnell v. City of Omaha, Nebraska,*** 999 F.2d 293, 297 (8th Cir.1993), cert. denied, 114 S.Ct. 1188 (1994); ***Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta,*** 920 F.2d 800, 805 (11th Cir.1991); ***York v. Wichita Falls,*** 944 F.2d 236, 242 (5th Cir.1991) (issue of material fact precluded granting summary judgment on whether fire captains were paid on a salaried basis). Notwithstanding, the district court opined perhaps the matter should be directed to this court and lobbed the issue onto our side of the net "to see which way they want to go on policy."

Our return is conscribed by those portions of the pleadings, depositions, affidavits, and answers to interrogatories identified by the moving party which the nonmovant cannot overcome, ***Celotex Corp. v. Catrett,*** 477 U.S. 317 (1986), to establish the absence of a genuine issue of material fact. While the ultimate conclusion plaintiffs are not exempt employees is subject to our de novo review, the district court's factual findings are sheathed in the clearly erroneous standard. ***Department of Labor v. City of Sapulpa, Okla.,*** 30 F.3d 1285, 1287 (10th Cir.1994). The only material issue presented in this case is whether plaintiffs are paid on a salary basis as defined by DOL's regulations. Because our discussion of the administration of the City's disciplinary rules disposes of that issue, we need not address plaintiffs' other allegations about military leave and jury duty.

II.

As a baseline, a salaried employee must be compensated "at a rate of not less than $250 per week," 29 C.F.R. § 541.1(f), a predetermined amount from which deductions may not be made for jury duty or military leave, § 541.118(a)(4), although the employer may offset any monies received from those activities from salary without losing the exemption. Deductions may be allowed for absences of "a day or more for personal reasons, other than sickness or accident," § 541.118(a)(2), without affecting salaried status. Nor do "[p]enalties imposed in good faith for infractions of safety rules of major significance," affect an employee's salaried status, § 541.118(a)(5), although "[s]afety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines." § 541.118(a)(5). Moreover, any unpermitted deduction "will depend upon the facts in the particular case," a loss of the exemption not automatically necessitated. § 541.118(a)(6). Each of these permitted deductions preserves DOL's definition of salaried status, 29 C.F.R. § 541.118(a), which states:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not ***subject to reduction*** because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his

> full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

(emphasis and italics added). It is the phrase, "subject to reduction" which the parties challenge, each citing those factual allegations which serve its partisan interpretation.

Plaintiffs maintain salaried employees are paid a fixed amount for doing a job. That is, they "are paid on a job function basis," in contrast to non-salaried employees "whose compensation depends on the number of hours they put in. The opposite of payment on a salary basis, then, is payment on an hourly basis," they state, quoting ***Hilbert v. District of Columbia, A Mun. Corp.***, 23 F.3d 429, 439 (D.C.Cir.1994) (Mikva, J. dissenting). Consequently, plaintiffs contend the City's express policies on disciplinary infractions, military leave, and leave for jury duty, which require "fining" the employee by deducting leave days from their "leave banks" or other leave offsets, render their fixed salaries "subject to reduction" because ultimately these contingent deductions reflect the "quality or quantity" of the work performed.

The City counters no plaintiff has had a reduction in salary as a consequence of any City policy or practice. Further, only a plaintiff's leave bank, the repository of all accumulated leave inuring to each plaintiff's position, is tapped, the City maintains; and, even then, only leave is offset against leave. In fact, the City argues, for Denver command officers who work more than the regularly assigned 152-hour schedule, the additional hours are

more properly a "bonus fringe benefit payment," not overtime hours triggering exemption scrutiny. The City relies on *Aaron*, 54 F.3d at 658, which it offers as dispositive of this Circuit's position on the "subject to" language in the salaried basis test.

Aaron, however, did not adopt either line of Circuit reasoning. Instead, the court hinged its resolution to the prerequisite that even for "circuits requiring less than actual docking to preclude exemption, [they] require an *express* policy that an employee's actual pay will be reduced in the event that accrued leave is exhausted." *Id.* We write, therefore, on a clean slate, addressing the City's policies to decide, first, whether its disciplinary rules conform to DOL's directive, "safety rules of major significance;" and, second, whether the City's enforcement of these rules renders plaintiffs' salaries "subject to reduction."

III.

The Denver Code § 42-28 gives the manager of safety:

> the power to fine any police officer, member or employee for any misconduct or breach of discipline or violation of the rules and regulations of the police department and to collect the same or cause it to be withheld from any amount that is or may become due such person.

In addition, "All officers and members of the classified service of the police department shall be subject to such rules and regulations as shall be prescribed from time to time by the manager of safety and chief of police." The

Denver Police Department Operations Manual catalogs an extensive list of rules spanning RR-105:

> **Conduct Prejudicial:** Officers shall not engage in conduct prejudicial to the good order and police discipline of the department or conduct unbecoming an officer which may not specifically be set forth in department rules;

to RR-402:

> **Careless Handling of Firearms:** Officers shall not carelessly handle a firearm at any time.[2]

In his affidavit, James Collier, a captain in the Denver Police Department and from September 1991 to October 1992, the Chief of Police, stated many of these rules and regulations "do not deal with the safety of employees or the City's property," and identified portions of the Operations Manual which provide specific disciplinary penalties for infractions of the rules. He noted that during his tenure as Chief, "the preferred method of assessing disciplinary penalties [is] to fine a member with the loss of one or more days off." He explained,

> This method of disciplinary penalty is preferred by the Department because it does not have a negative impact on departmental manpower and is preferred by the officers because it does not directly reduce their paycheck during any pay period. Instead, what the officer can do at the officer's option, is work a day without

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[2] Other rules of interest, to name only a few, are RR-112, **Departing from the Truth**; RR-134, **Use of Tobacco Products by Certain Officers**; RR-135, **Maintenance of Fitness Level by Certain Officers; RR-202, Soliciting or Accepting a Bribe**; and RR-306, **Unnecessary Force** in making arrests.

> receiving any compensation or forfeit an accrued day off so that the accrued day off cannot be used to take time off with pay in the future.

Captain Collier added that occasionally officers were actually suspended from duty without pay and described a case in which he, with the Manager of Safety's approval, suspended plaintiff Lieutenant Dale Canino for 60 days for departing from the truth in violation of RR-112. Plaintiff Canino was then demoted to the rank of sergeant upon his return to work.

Further, Captain Collier attested that each officer must keep track of all hours worked, receive authorization for additional hours, and seek approval by a supervisor for any absences. If the officer has leave time available, Captain Collier noted, the paycheck will reflect no deductions. However, if there is no available leave time, "the officer's pay will be reduced for the time absent." He asserted, while Chief of Police, he was never told the safety rules were to be read restrictively to mean he could only suspend command officers for violation of safety rules of major significance.

Aristedes W. Zavaras, Chief of Police from 1987 until 1991, stated in his affidavit he was never told about a restrictive reading of the City's safety provision and would "have opposed it because of my strong belief that maintaining order in the Department required at least uniform discipline across all ranks and, in some cases, potentially even higher discipline of higher ranking officers." He stated that during his tenure he suspended Lieutenant Buckley Stewart for violation of RR-105, conduct unbecoming an officer, which he "did not consider

. . . as implicating safety issues at all." He added, had Lieutenant Stewart not complied with the conditions of his suspension, he would then have suspended him without pay for three days. He further attested he did not recall imposing any suspensions on police command officers which caused a loss of salary.

The record contains additional deposition testimony from managers of safety explaining the policy of "fining" officers for violations of departmental rules and the practice of satisfying the fine with leave or "save days."[3] Lieutenant Steven B. Cooper, who is in charge of the Denver Police Department's Personnel Bureau, stated in his affidavit that by City ordinance the additional time command officers work is not considered "overtime" but compensatory time, and the City preferred its payment by the "allowance of time off," not cash. He stated, "[i]t is only at the discretion of the Chief of Police that salary at the rate of time and one-half can be paid for overtime required pursuant to Denver's ordinances." He stated that no command officer at the rank of lieutenant or above had lost pay as a result of a disciplinary action for the violation of departmental rules and described how officers can flex their pay to avoid pairing time away with leave time in all instances. He further stated that officers exceeding the 15-day authorized time for military leave may use "accrued vacation, save days, compensatory time, or other appropriate leave."

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[3] A "save day" is earned by working days off in earlier time periods.

Although the plaintiffs rely on this record testimony to establish their predetermined salary has the potential to be reduced under terms not recognized by the DOL regulations, the City contends the same evidence illustrates that in actuality no plaintiff's salary has been reduced as a consequence of the imposition of its disciplinary or military leave policies. The City extols the importance of maintaining the good and moral order of its police force, refashioning many of these good conduct rules to implicate public safety as its ultimate disciplinary mission. Nevertheless, it concedes if an officer is demoted because of an infraction of a disciplinary rule, the officer's salary is reduced.

"Unfortunately, the FLSA regulations are not written to help promote discipline and public safety." ***Avery v. City of Talladega, Ala.***, 24 F.3d 1337, 1341 (11th Cir.1994). In ***Avery***, the City suspended two police lieutenants classified exempt from the overtime requirement, one for leaving the scene of a suicide and the other for using excessive force against an inmate. The Eleventh Circuit agreed with plaintiffs neither violation could be deemed an infraction of a safety rule of major significance. "That is how the regulations, which are concerned with the employer's property and the safety of fellow employees instead of with public safety, restrict the definition of 'safety rules of major significance.' " ***Id.*** The court observed, "Of course, the City may suspend employees without pay for other types of insubordination or misconduct, but the price for doing so is loss of its ability to treat those employees as executive, administrative, or professional employees exempt from overtime pay." ***Id.***

We believe if we are to construe exceptions to the FLSA narrowly, giving substantial deference to DOL's interpretation of its own rules, ***International Ass'n of Fire Fighters, Local 2203 v. West Adams Cty. Fire Protection Dist.***, 877 F.2d 814, 817 (10th Cir.1989), we must conclude the City's express policy on discipline does not conform to DOL's parameters. Its "safety rules," in fact, are more often rules of behavior involving an officer's daily conduct on the force. Because the rules fall short, the City's punishing an errant officer by removing leave time from the officer's leave repository creates the potential for reducing pay. When leave is exhausted, the record makes clear a plaintiff's salary is "subject to reduction." That is, then, the quality of the officer's work may ultimately reduce the predetermined amount of salary the officer receives. Reading the regulations narrowly, we cannot say that employee is salaried.

Thus, we understand "subject to" in § 541.118(a) to mean the possibility and not the actuality of a reduction in pay removes an employee from exempt status. Consequently, we reject the City's revision that plaintiffs remain salaried employees because their salaries have not actually been reduced. We agree with the Seventh Circuit that " '[s]ubject to reduction' does not mean that a reduction was actually made. The plain meaning of the language suggests that it is enough that a deduction could have been made for an impermissible reason." ***Klein v. Rush-Presbyterian-St. Luke's Medical Ctr.***, 990 F.2d 279, 286 (7th Cir.1993).[4]

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[4] In ***Klein v. Rush-Presbyterian-St. Luke's Medical Ctr.***, 990 F.2d 279 (7th Cir.1993), the hospital employer suspended a staff

This reading comports with the general definition of a salaried employee's being paid a predetermined amount unaffected by quality or quantity of work. As the Ninth Circuit stated in ***Abshire v. County of Kern,*** 908 F.2d 483, 487 (9th Cir.1990), cert. denied, 498 U.S. 1068 (1991), "[e]ither pay is fixed and immutable, and not subject to such deductions, or it is contingent." The regulations detail those specific instances permitting deductions from salary without a loss of the exemption, for example, § 541.118(a)(2) and (a)(3), and expressly limit discipline to "[p]enalties imposed in good faith for infractions of safety rules of major significance," § 541.118(a)(5). DOL's illustration of this rule is straightforward: conduct that could cause serious danger of property loss to an employer's physical plant or harm to other employees.

Surely, a police lieutenant's insubordination affects the quality of his work. However, it falls short of DOL's specification that quality implicates the essential reason for which the employee performs his job and quantity

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nurse for being rude, abrupt, and irritable to other staff members and a patient's visitor. The employer characterized this behavior as an unsafe nursing practice although she was also suspended for tardiness, rudeness, and personal appearance. Recognizing plaintiff's actions could not be cubby holed into the "safety rule of major significance" category, the Seventh Circuit rejected the employer's effort to exempt plaintiff from the FLSA's overtime provision. The court found that her suspensions, which included salary reductions, affected the quality or quantity of her work. "This is inconsistent with the regulation's requirement of a salaried employee for the FLSA exemption and inconsistent with the interpretation's definition of a salaried employee." ***Id.*** at 285.

focuses on performing the job itself, not merely showing up.[5] Indeed, suspending an employee for three days or so for some sort of behavioral misconduct as this record reveals suggests "if an employer measures out discipline in the form of fractions of a weekly salary, the implication is that the employee is really being paid on an hourly basis." ***Mueller v. Reich***, 54 F.3d 438, 443 (7th Cir.1995).

That the City has never, in fact, reduced a plaintiff's salary is not cognizable under § 541.118(a). Its express policy in § 42-28 of the Denver Code authorizes the manager of safety "to collect . . . or cause to be withheld from any amount that is or may become due such person." That is the actual policy whether it is administered that way or differently. Moreover, as the court noted in ***Michigan Ass'n of Gov. Emp. v. Michigan Dept. of Corr.***, 992 F.2d 82, 86 (6th Cir.1993):

> First, this approach is more consistent with the regulatory language defining a salaried employee. . . . Second, focusing on the actual policy is more practical and realistic. Employees subject to reduction in pay will, of course, attempt to avoid those reductions by juggling schedules and sacrificing non-work opportunities. Simply because a reduction in pay has never been applied does not mean that the employee has not been affected by the policy subjecting the employee to pay reductions.

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[5] We do not address the no docking rules for partial day absences given DOL's amendment to § 541.118, 29 C.F.R. § 541.5d, which permits a public employer to offset certain partial day absences without jeopardizing the exempt status of its salaried employees.

Furthermore, although several affiants indicated plaintiffs receive sufficient leave to continually bank, neither plaintiffs nor the City asserted that is was impossible to exhaust the leave bank, which would require the City's personnel officer to reduce an otherwise exempt employee's salary in confiict with that status.[6]

Consequently, if the City chooses to discipline a police lieutenant for inappropriate and offensive conduct, it may do so. That action, however, does not fit within DOL's definition of a "safety rule of major significance" and defeats the City's claim plaintiffs are salaried employees exempt from the payment of overtime. Of course, the City may change or enforce its departmental rules to conform to the DOL regulation. That is a matter best left to the City. At present, however, the departmental rules do not constitute safety rules of major significance and scuttle its exemption claim.

We, therefore, **REVERSE** the district court's grant of summary judgment and order the court to enter judgment in favor of plaintiffs. We **REMAND** for further proceedings on damages, including the possible availability of liquidated damages under the FLSA.

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[6] We have no information in the record about what happens to the leave bank when plaintiff terminates his service to the police department. If, in fact, plaintiffs receive equivalent cash for the days stored, deducting days from that source would surely affect the ultimate salary received.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

C. KELLY CARPENTER, W. DAVID ABRAMS, STEVE R. ALLISON, L. H. AMMAN, WILLIAM L. AUMILLER, LESTER J. BEAULIEU, JR., EDWARD B. BINGHAM, DONALD G. BOWLING, LOREN L. BOYDSTON, DAVID BRICKER, DALE A. ILLEGIBLE, RICHARD W. CASTRICONE, ROBERT W. COLBORN, JAMES R. COLLIER, EDWARD A. CONNORS, HEATHER A. COOGAN, TIMOTHY J. CUTHRIELL, VINCENT J. DIMANNA, GARY J. ELLIS, DONALD L. FINK, PATRICK L. FLYNN, GERALD FRAZZINI, BRIAN D. GALLAGHER, PETER M. GARCIA, GARY L. GRAHAM, THOMAS P. HANEY, JR., EDWARD B. HANSEN, THOMAS J. HEATH, LYLE D. HESALROAD, ROBERT T. HILBURN, PAUL C. KAISER, JOHN F. KILPATRICK, MARY BETH KLEE, WAYNE KRIEGER, THOMAS C. LAHEY, TIMOTHY W. LEARY, JAMES LEO, GARY J. LEUTHAUSER, RAYMOND J. LIBONATI, EDWARD LUJAN, JR., DAVID H. LUSK, DONALD R. MADDOCK, JUAN A. MALDONADO, STEVE C. METROS, JOHN W. MLINAR, WILLIAM R. MOHR, PAUL L. MUELLER, PATRICK V. MULHERN, C. DOUGLAS NOE, JOHN O'DELL,	)	No. 95-1245

DANIEL J. O'HAYRE, MICHAEL T. O'NEILL, JOSEPH G. ORTIZ, MONTE C. PATTESON, JAMES D. PONSI, BOBBY E. REAGAN, MIRIAM REED, ERNESTINE ROWE, R. ANTHONY RYAN, DENNIS J. SALAZAR, DONALD SALTZMAN, TOM SANCHEZ, RUDOLF SANDOVAL, DANIEL J. DEWALD, CHARLES SMITH, ROBERT B. STEELY, BUCKLEY T. STEWART, ROBERT L. SWANSON, JOHN C. THOMPSON, GEORGE F. TORSNEY, MARCO K. VASQUEZ, FRANK J. VESSA, ELIZABETH WALTER, WILLIAM A. WEB, JOHN L. WEBER, THOMAS A. WHEELER, GERALD E. WHITMAN, CURTIS D. WILLIAMS, THOMAS F. WOOD, DANIEL D. YOUNT,

Plaintiffs - Appellants,

v.

CITY & COUNTY OF DENVER, COLORADO,

Defendant - Appellee.

ORDER
Entered May 21, 1996

Before PORFILIO, BARRETT, and LUCERO, Circuit Judges.

This matter comes on for consideration of appellee's petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court

PATRICK FISHER, Clerk

By: /s/ Audrey F. Weigel
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Zita L. Weinshienk

Civil Action No. 93-Z-2513

C. KELLY CARPENTER, et al.,

Plaintiffs,

v.

CITY AND COUNTY OF DENVER,

Defendant.

JUDGMENT OF DISMISSAL

(Filed Apr. 10, 1995)

This matter was before the Court on April 10, 1995, for oral argument on Defendant's Motion For Summary Judgment and Plaintiffs' Motion For Partial Summary Judgment. The Court heard the arguments and statements of counsel and made oral conclusions of law which are incorporated herein by reference as if fully set forth. Accordingly, it is

ORDERED that Plaintiffs' Motion For Partial Summary Judgment is denied. It is

FURTHER ORDERED that Defendant's Motion For Summary Judgment is granted. It is

FURTHER ORDERED that judgment is entered in favor of defendant and against plaintiffs for dismissal. It is

FURTHER ORDERED that the parties shall pay their own costs.

DATED at Denver, Colorado, this 10th day of April, 1995.

BY THE COURT:

/s/ Zita L. Weinshienk
ZITA L. WEINSHIENK,
Judge
United States
District Court

April 11, 1995

Civil Action No. 93-Z-2513

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the above date copies of JUDGMENT OF DISMISSAL entered by Judge Zita L. Weinshienk and filed on April 10, 1995, were mailed to the following:

Thomas B. Buescher, Esq.
Dennis Valentine, Esq.
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Assistant City Attorneys
1445 Cleveland Place, Room 303
Denver, CO 80202

Magistrate Judge Donald E. Abram

JAMES R. MANSPEAKER, Clerk

By /s/ Charlotte Hoard
Deputy Clerk

* * *

[p. 35] also been undermined because of the **Barner** and **Service Employees** decision out of that circuit.

So I don't think that the plaintiffs have a case squarely for that proposition that I can recall.

THE COURT: All right. I'd like to wind up the argument, but let me give you the last word.

PLAINTIFFS' FURTHER REBUTTAL ARGUMENT

MR. BUESCHER: Your Honor, I just would with respect to what circuits have held what on the "subject to," Second Circuit has also gone along with the "subject to" test in the **Martin vs. Malcolm Pirnee,** P-I-R-N-E-E, case, 949 F.2d 615.

And your Honor, again I want to say what I said about the Ninth Circuit before: All the **Local 102** decision does is say that those regulations that existed up to a point in time were invalid. It did not reverse the application of those regulations that still exist to facts of any particular case. It never got there, and so it doesn't overrule all those other cases that tried to apply facts to regulations. It just says if you were applying facts to regulations that existed before September, 1991, those regulations are invalid, period. That's all that case says.

RULING

THE COURT: Perhaps this is a case where it's time for the Tenth Circuit to rule; and the Court will certainly give the Tenth Circuit opportunity to do so, if the parties choose [p. 36] to appeal this court's decision,

because the court intends at this time to grant the defendant's motion for summary judgment and deny the plaintiffs' motion for summary judgment.

We do have the case law in the sister circuit, the Eighth Circuit – Eighth Circuit, Eleventh, Fifth – which support the actual docking of pay principles. We have some other jurisdictions that perhaps are a little iffy as to how they should be applied. We have, of course, on the subject to docking, we have the Second and the Seventh. You mentioned the D.C. We have some questions about – now I think questions about the Sixth and the Ninth, and nothing of course in the Tenth.

It appears to me that if there is going to be any change in how the lieutenants and above are paid for overtime – and they've been paid in a certain way for a long amount of time – hopefully it should be done internally within the city's rules and not based on federal law and department of labor.

The Court feels that the case law that should be followed on the view of actual docking vs. subject to docking should indeed be the Eighth, Eleventh, Fifth, and other circuits, especially in view of what appears to be some change of position, not that we're really that close – closely aligned with the Ninth, but which seems to call into question the older Ninth Circuit decision, the **Abshire** decision.

[p. 37] We do have – plaintiff is arguing that we have to look at every single one of the plaintiffs on a motion for summary judgment; and that means that there are factual issues and that the case has to go to trial.

But indeed under motions for summary judgment, we do look at affidavits, and we do have the affidavits that have been mentioned, initially the Cooper affidavit and the Hill affidavit. We have the DOL ruling as late as 1991, indicating that the usual finding is that lieutenants and above in the police department will meet the requirements to be exempt. We do have under regulations and case law that the discretion really goes to how much leeway an employee has in doing his or her job in general, not only just in the management – discretion of the management of the department.

We do indeed have some indications in the DOL ruling which has previously been mentioned as to executive employees and the fact that they must supervise and be able to hire or fire or give recommendations and explaining about the salary level, all of which seems to the Court to lead to the conclusion that as a matter of law, the defendants have sustained their burden of showing – and I agree that the defendant has the burden in this case – of showing that the plaintiffs are – are exempt and that DOL – that the Department of Labor regulations do not apply to them.

I don't think there really are factual issues that are [p. 38] before me that need to go to the jury on this; and if, indeed, this circuit is going to follow the "subject to docking" circuits which have been mentioned by the plaintiff, rather than following the decisions of the Eighth, Eleventh, Fifth, etc., I think that's something really to be decided on the circuit level.

I need to say also that I don't think the **Klein** case really helps the plaintiff in the interpretation of subparagraph 5. I'm talking now about 541.118(a)(5). There is a big difference in saying that if penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status that there is an inference that penalties imposed for other reasons do affect it – that negative inference – and the more limited negative inference in the **Klein** case, which is simply that – and which it appears is a more logical inference – that infractions of safety rules of non major or minor significance are not permissible under the interpretations, since penalties for safety rules of major significance are – that is a negative inference that deals with major or minor infractions of safety rules, rather than penalties for safety rules vs. other types of penalties. I just can't take the negative inference that far from a logical or a legal analysis.

The Court's decision after hearing the arguments of both sides is that the case should be decided favorably to the [p. 39] defendant. The plaintiff has shown no way to – no reason to change what has been the longstanding policy under Department of Labor regulations or under the statute or under the rulings; and the Court is satisfied that plaintiffs in this case continue to be exempt and that therefore the case should be dismissed and we should leave it up to the Tenth Circuit to see which way they want to go on policy.

For that reason, the Court will grant the – as I indicated initially – grant the defendant's motion for summary judgment, deny the plaintiffs' motion for summary

judgment, and let the parties decide what they want to do on the appeal.

Is there anything further that needs to be put on the record? Mr. Buescher?

MR. BUESCHER: No, your Honor.

MS. EBERT: No, your Honor.

THE COURT: All right. Thank you very much for an interesting and well prepared argument, and the Court will take a short recess before going on to the next matter.

(Recess at 11:10 a.m.)

* * *

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* * *

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 17th day of April, 1995.

/s/ Paul A. Zuckerman
Paul A. Zuckerman

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 95-1245

C. KELLY CARPENTER, et al.,

Appellants,

and

CITY AND COUNTY OF DENVER,

Appellee.

APPEAL FROM ORDER OF DISMISSAL BY DISTRICT JUDGE ZITA WEINSHIENK

AMENDED CERTIFICATE OF MAILING

The undersigned certifies that a true copy of the foregoing Court's WRITTEN FINDINGS AND TRANSCRIPT OF

ORAL FINDINGS has been placed in the United States mail, postage prepaid, addressed to:

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Respectfully submitted,

BRAUER, BUESCHER,
VALENTINE, GOLDHAMMER &
KELMAN, P.C.

/s/ Thomas B. Buescher
Thomas B. Buescher, 6796
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Denver, CO 80206
(303) 333-7751

29 U.S.C. § 203 FAIR LABOR STANDARDS ACT

* * *

(e)(1) Except as provided in paragraphs (2), (3), and (4) the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means –

* * *

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual –

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who –

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level,

(IV) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or

(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency

* * *

29 U.S.C. § 206 FAIR LABOR STANDARDS

§ 206. Minimum wage

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than $3.35 an hour during the period ending March 31, 1990, not less than $3.80 an hour during the year beginning April 1, 1990, and not less than $4.25 an hour after March 31, 1991;

* * *

29 U.S.C. § 207 FAIR LABOR STANDARDS

§ 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * *

29 U.S.C. § 207 FAIR LABOR STANDARDS

* * *

(k) Employment by public agency engaged in fire protection or law enforcement activities

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if –

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

* * *

29 U.S.C. § 213 FAIR LABOR STANDARDS

§ 213. Exemptions

(a) Minimum wage and maximum hour requirements

The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to –

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

* * *

29 CFR § 541.1 Executive.

The term *employee employed in a bona fide executive * * * capacity* in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department of [sic] subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: *Provided,* That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he is employed; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week (or $130 per

week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: *Provided*, That an employee who is compensated on a salary basis at a rate of not less than $250 per week (or $200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

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29 CFR § 541.5d Special provisions applicable to employees of public agencies.

(a) An employee of a public agency who otherwise meets the requirements of § 541.118 shall not be disqualified from exemption under §§ 541.1, 541.2, or 541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because –

(1) permission for its use has not been sought or has been sought and denied;

(2) accrued leave has been exhausted; or

(3) the employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid "on a salary basis" *except* in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

29 CFR § 541.118 Salary basis.

(a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

(1) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in

accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy or practice provides compensation for such absences, deductions for absences of a day or longer because of sickness or disability may be made before an employee has qualified under such plan, policy or practice and after he has exhausted his leave allowance thereunder. It is not required that the employee be paid any portion of his salary for such days or days for which he receives compensation for leave under such plan, policy or practice. Similarly, if the employer operates under a State sickness and disability insurance law, or a private sickness and disability insurance plan, deductions may be made for absences of a working day or longer if benefits are provided in accordance with the particular law or plan. In the case of an industrial accident, the "salary basis" requirement will be met if the employee is compensated for loss of salary in accordance with the applicable compensation law or the plan adopted by the employer, provided the employer also has some plan, policy or practice of providing compensation for sickness and disability other than that relating to industrial accidents.

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is not work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

* * *

29 CFR § 553.230(b)

* * *

(b) For those employees engaged in law enforcement activities (including security personnel in correctional institutions) who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required under section 7(k) until the number of hours worked exceeds the number of hours which bears the same relationship to 171 as the number of days in the work period bears to 28.

* * *

RULES and REGULATIONS

DEPARTMENT OF LABOR

Employment Standards Administration;
Wage and Hour Division

29 CFR Part 541

Exemptions From Minimum Wage and Overtime Compensation Requirements of the Fair Labor Standards Act; Public Sector Employers

Friday, September 6, 1991

*45824 AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Interim final rule; request for comments.

SUMMARY: These interim final regulations relative to governmental pay practices under Regulations, 29 CFR part 541, contain revised criteria for exemption from the minimum wage and overtime compensation requirements of the Fair Labor Standards Act (FLSA) for executive, administrative, and professional employees. The purpose of this revision is to provide an exception from certain provisions requiring payment "on a salary basis" applicable only to public sector employees.

DATES: Effective Date: The interim final rule is effective on September 6, 1991.

Comments are due on or before October 7, 1991.

ADDRESSES: Submit written comments to John R. Fraser, Acting Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, room S-3502, 200 Constitution Avenue, NW., Washington, DC 20210. Commenters who wish to receive

notification of receipt of comments are requested to include a self-addressed, stamped post card.

FOR FURTHER INFORMATION CONTACT: J. Dean Speer, Director, Division of Policy and Analysis, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, room S-3506, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 523-8412 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

Since the enactment of the FLSA in 1938, Congress and the Supreme Court have each periodically acknowledged the special circumstances of, and the different treatment to be accorded to, governmental employers and employees under the FLSA, as distinguished from employment in the private sector.

The regulations governing exemption from the requirements of the Act for employees who are "executive, administrative, professional * * * " generally require that such employees meet regulatory standards with respect to both their duties and their compensation. Compensation must be greater than the amount specified in the regulations, and must be "on a salary basis." These matters are defined and explained in 29 CFR part 541. These regulations were adopted prior to the extension of FLSA coverage to public employees and, therefore, make no distinction between public and private employment.

In administering the FLSA in the public sector[1], the Department has become aware that few public employers compensate employees in a manner that meets the "on a salary basis" requirement for exemption under the current regulation. Governmental payroll systems commonly prohibit paying employees for time not actually worked. Systems of leave in the public sector (as often is the case in the private sector) are generally relied on as the exclusive method to permit employees who might otherwise not be compensated for periods of absence to avoid reduction of compensation in connection with such absences.

The Department initially attempted to address this problem by means of an enforcement policy, adopted by the Wage and Hour Division on January 9, 1987. The policy, which is still in effect, provides that the Division, will not deny exemption pursuant to section 13(a)(1) of the FLSA to an otherwise exempt executive, administrative, or professional employee in the public sector whose pay is reduced by deductions for absence(s) of less than a

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[1] With respect to Federal employees, as provided in section 4(f) of FLSA, DOL administers the Act for employees employed in the Library of Congress, United States Postal Service, Postal Rate Commission, and the Tennessee Valley Authority; the Office of Personnel Management (OPM) administers FLSA with respect to all other employees of the Federal government except certain Congressional employees. See 29 U.S.C. section 204(f), Reorganization Plan No. 2 of 1978 (92 Stat. 3783), and section 8 of the Fair Labor Standards Amendments of 1989 (Pub. L. 101-157). Thus, the reference to Federal government employees in this rulemaking extends the revision to those Federal employees with respect to whom DOL is authorized to administer the Act.

day for personal reasons, or because of illness or accident, because the employee does not have, or has exhausted available paid leave for such absence(s). This policy applies only where applicable State or local law, in effect before April 15, 1986, prohibits payment to employees for such absences which are not covered by paid leave.

The Wage and Hour Division's 1987 enforcement policy does not affect the rights of public employees to file private lawsuits under section 16(b) of the FLSA. Since the U.S. Supreme Court's decision in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), there have been numerous lawsuits by public employees to recover overtime pay. The courts in these cases have approached the construction of the regulations in different fashions, and have reached differing results.

Some courts have found the exemption to be inapplicable for the sole reason that the public entity's pay practices did not meet the "on a salary basis" requirement. Construing the existing regulations, some courts have held that employees under a pay system which requires that deductions be made when the employee is absent and has no leave are not paid "on a salary basis" even where no such deductions have occurred. In these circumstances the "salary basis" requirement is not met because the employee's compensation was subject to deductions for absences of less than one day when all accumulated leave was exhausted. See, e.g., Abshire v. County of Kern, 908 F. 2d 483 (9th Cir. 1990) cert. denied, 111 S.Ct. 785, rehearing denied, 111 S.Ct. 1341 (1991); Banks v. City of North Little Rock, 708 F. Supp. 1023 (E.D. Ark. 1988); D'Camera v. District of Columbia, 693 F.

Supp. 1208 (D.D.C. 1988); Hawks v. City of Newport News, Va., 707 F. Supp. 212 (E.D. Va. 1988).

On the other hand, some courts have considered that even in the above-described circumstances a salary was not subject to deduction where there was no evidence that the employee's pay was ever reduced, that only actual and not "theoretical" deductions could invalidate the salary basis of compensation, and that rare instances of docking pay for absences of less than a day did not defeat the exemption (except in a workweek in which deduction was made). See, e.g., Atlanta Professional Firefighters Union v. Atlanta, 920 F. 2d 800 (11th Cir. 1991); Harris v. District of Columbia, 709 F. Supp. 238 (D.D.C. 1989); and DC Nurses Assn. v. District of Columbia, 29 WH Cases 868 (D.D.C. 1988). Some courts have also allowed application of the "correction" provisions at 29 CFR 541.118(a)(6) to preserve exempt status in cases where the public employer made "inadvertent" deductions from pay for absences of less than a day when leave was exhausted, reimbursed the affected employee for such deductions, and promised future compliance. See e.g., Hartman v. Arlington County, Va., 720 F. Supp. 1227 (E.D. Va. 1989), aff'd, 903 F. 2d 290 (4th *45825 Cir. 1990); Fire Fighters Local 2141 v. City of Alexandria, Va., 720 F. Supp. 1230 (E.D. Va. 1989), aff'd., 912 F. 2d 463 (4th Cir. 1990); Harkins v. City of Chesapeake, 29 WH Cases 1399 (E.D. Va. 1988); Chadwick v. City of Norfolk, Va., 29 WH Cases 1407 (E.D. Va. 1988); and Sarver v. City of Roanoke, Va., 29 WH Cases 1442 (W.D. Va. 1989).

The Department has been considering (and continues to consider) a variety of possible changes to the regulations governing the exemption for bona fide executive,

administrative, and professional employees, including the particular requirement in the public sector that such employees be paid on a salary basis.

In the meantime, these diverging judicial interpretations and accompanying confusion have developed, resulting in the exposure of governmental employers to potentially enormous and generally unexpected back wage liabilities to employees, some of whom would clearly be exempt if duties and amount of compensation alone were examined. Such unforeseen liabilities could seriously threaten the fiscal integrity of State and local governmental agencies, and could seriously disrupt widespread pay practices that were designed and intended to serve the public trust and were established long before State and local government employees were subject to the Fair Labor Standards Act.

State and local government jurisdictions have varied pay policies. Some of these pay policies are based on constitutional or statutory provisions while others are derived from regulations or policies that have evolved over the years. These pay systems are generally premised on the concept – based on principles of public accountability – that governmental employees should not be paid for time not worked, and that there is a need to be accountable to the taxpayers for the expenditure of public funds.

For these reasons the Department is of the view that public sector pay systems must be analyzed differently from, because they are significantly distinguishable from,

private sector pay systems. In the Department's judgment, certain aspects of the existing "salary basis" regulatory requirement for exemption are unduly restrictive when applied in the public sector. These aspects are not, in the Department's judgment, valid indicators in the public sector of the bona fides of a claimed exemption under section 13(a)(1). State and local governments are thus inappropriately deprived of the opportunity to apply the section 13(a)(1) exemption to their employees who would otherwise be properly exempt.

While the Department is continuing its overall review of the full range of issues raised by the public comments submitted on its advance notice of proposed rulemaking of November 19, 1985 (50 FR 47696), it is undertaking this separate rulemaking on the specific issue of application of the "salary basis" of payment for public sector employees. As discussed below, it is considered necessary to issue an interim final rule so as to stem any accrual of additional liability to State and local governments while consideration is given to the comments received on the rule.

II. Paperwork Reduction Act

This regulation contains no reporting or recordkeeping requirements.

III. Summary of the Rule

A new s 541.5d is being added that provides that an otherwise exempt public sector employee who is paid according to a pay system that requires the use of paid

leave and, absent the use of paid leave, reduces the employee's pay for absences of less than one work-day, will not be disqualified from exemption due to such pay system. This rule also provides that the exemption will not be defeated by deductions from salary caused by budget-required furloughs, which are not regular and recurring, except in the workweek in which such a deduction occurs.

Executive Order 12291

This rule is not considered to be a "major rule" within the meaning of Executive Order 12291, in that under the status quo, most public employers consider otherwise-exempt employees to be exempt, notwithstanding public sector pay systems under which their pay is subject to deductions for absences of less than one day. Furthermore, under current Department of Labor enforcement policy, the exemption would generally not be denied by the Department to such employees. Therefore the rule is not likely to result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Therefore, no regulatory impact analysis is required.

Regulatory Flexibility Analysis

The Department has determined that this rulemaking will not have a significant economic impact on a substantial number of small entities. This conclusion is based on the fact that under the status quo, most public employers consider otherwise-exempt employees to be exempt, notwithstanding public sector pay systems under which their pay is subject to deductions for absences of less than one day. Furthermore, under the current Department of Labor enforcement policy, the exemption would generally not be denied by the Department to such employees. In addition, because no notice of proposed rulemaking is required for the rule under 5 U.S.C. 553(b), the requirements of the Regulatory Flexibility Act pertaining to regulatory flexibility analysis do not apply to this rule. See 5 U.S.C. 601(2).

Publication as an Interim Final Rule

Application of the salary basis test to State and local government employees may result in denial of the exemption to thousands of such employees who have been considered exempt by their employers. The Department considers it inappropriate that public sector employees be denied the exemption because they fail to meet the "on a salary basis" test under pay systems imposed by law, regulation or public policy that were established pursuant to principles of public accountability even before extension of the Act to such employees. Such application could well result in enormous, unforeseen liability of such governments and may threaten their fiscal integrity. For these reasons it has

been determined that an interim final rule is appropriate to forestall accrual of additional liability while the Department receives and considers comments in the preparation of any final rule which would be determined to be appropriate. Accordingly, the Secretary finds, pursuant to 5 U.S.C. 553(b)(3)(B), that prior notice and public comment are contrary to the public interest.

For the same reasons, the Secretary also for good cause finds, pursuant to 5 U.S.C. 553(d)(3), that this rule cannot be published 30 days before its effective date.

*45826 Document Preparation

This document was prepared under the direction and control of John R. Fraser, Acting Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

List of Subjects in 29 CFR Part 541

Labor, Minimum wages, Overtime pay, Salaries, Teachers, Wages.

Accordingly, part 541 of title 29 of the Code of Federal Regulations is amended as set forth below.

Signed at Washington, DC, on this 3rd day of September 1991.

PROPOSED RULES

DEPARTMENT OF LABOR

Employment Standards Administration;
Wage and Hour Division

29 CFR Part 541

Exemptions From Minimum Wage and Overtime Compensation Requirements of the Fair Labor Standards Act; Public Sector Employers

Friday, September 6, 1991

*45828 AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Notice of proposed rulemaking, request for comments.

SUMMARY: The Department of Labor proposes to revise the regulations governing exemption from minimum wage and overtime compensation under the Fair Labor Standards Act (FLSA) for executive, administrative and professional employees in the public sector. This proposal would allow governmental entities to restore eligibility for exemption under the rules governing payment "on a salary basis" at 29 CFR part 541, s 541.118(a)(6), for otherwise-exempt public employees subject to pay systems that provide for the use of paid leave and, when accrued leave is not used, result in deductions from pay for absences of less than one work-day.

DATES: Comments are due on or before October 7, 1991.

ADDRESSES: Submit written comments to John R. Fraser, Acting Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of

Labor, room S-3502, 200 Constitution Avenue, NW., Washington, DC 20210. Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed, stamped post card.

FOR FURTHER INFORMATION CONTACT: J. Dean Speer, Director, Division of Policy and Analysis, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, room S-3506, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 523-8412 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

Since the enactment of the FLSA in 1938, Congress and the Supreme Court has each periodically acknowledged the special circumstances of, and the different treatment to be accorded to, governmental employers and employees under the FLSA, as distinguished from employment in the private sector.

The regulations governing exemption from the requirements of the Act for employees who are "executive, administrative, professional * * * " generally require that such employees meet regulatory standards with respect both to their duties and their compensation. Compensation must be greater than the amount specified in the regulations, and must be "on a salary basis." These matters are defined and explained in 29 CFR part 541. These regulations were adopted prior to the extension of FLSA coverage to public employees and, therefore, make no distinction between public and private employment.

In administering the FLSA in the public sector[1] the Department has become aware that few public employers compensate employees in a manner that meets the "on a salary basis" requirement for exemption under the current regulation. Governmental payroll systems commonly prohibit paying employees for time not actually worked. Systems of leave in the public sector (as often is the case in the private sector) are generally relied on as the exclusive method to permit employees who might otherwise not be compensated for periods of absence to avoid reduction of compensation in connection with such absences.

The Department initially attempted to address this problem by means of an enforcement policy adopted by the Wage and Hour Division in January 1987. The policy, which it still in effect, provides that the Division will not deny exemption pursuant to section 13(a)(1) of the FLSA to an otherwise exempt executive, administrative, or professional employee in the public sector whose pay is reduced by deductions for absence(s) of less than a day

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[1] With respect to Federal employees, as provided in section 4(f) of FLSA, DOL administers the Act for employees employed in the Library of Congress, United States Postal Service, Postal Rate Commission, and the Tennessee Valley Authority; the Office of Personnel Management (OPM) administers FLSA with respect to all other employees of the federal government except certain Congressional employees. See 29 U.S.C. 204(f), Reorganization Plan No. 2 of 1978 (92 Stat. 3783), and s 8 of the Fair Labor Standards Amendments of 1989 (Pub. L. 101-157). Thus, the reference to Federal Government employees in this rulemaking extends the revision to those Federal employees with respect to whom DOL is authorized to administer the Act.

for personal reasons, or because of illness or accident, because the employee does not have, or has exhausted available paid leave for such absence(s). This policy applied only where applicable State or local law in effect prior to April 15, 1986, prohibits payment to employees for such absences which are not covered by paid leave.

The Wage and Hour Division's 1987 enforcement policy does not affect the rights of public employees to file private lawsuits under section 16(b) of the FLSA. Since the U.S. Supreme Court's decision in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), there have been numerous lawsuits by public employees to recover overtime pay. The courts in these cases have approached the construction of the regulations in different fashions, and have reached differing results.

Some courts have found the exemption to be inapplicable for the sole reason that the public entity's pay practices did not meet the "on a salary basis" requirement. Construing the existing regulations, some courts have held that employees under a pay system which requires that deductions be made when the employee is absent and has no leave are not paid "on a salary basis" even where no such deductions have occurred. In these circumstances the "salary basis" requirement is not met because the employee's compensation was subject to deductions for absences of less than one day when all accumulated leave was exhausted. See, e.g., Abshire v. County of Kern, 908 F. 2d 483 (9th Cir. 1990) cert. denied, 111 S.Ct. 785, rehearing denied, 111 S.Ct. 1341 (1991); Banks v. City of North Little Rock, 708 F. Supp. 1023 (E.D. Ark. 1988); D'Camera v. District of Columbia, 693 F.

Supp. 1208 (D.D.C. 1988); Hawks v. City of Newport News, Va., 707 F. Supp. 212 (E.D. Va. 1988).

On the other hand, some courts have considered that even in the above-described circumstances a salary was not subject to deduction where there was no evidence that the employee's pay was ever reduced, that only actual and not "theoretical" deductions could invalidate the salary basis of compensation, and that rare instances of docking pay for absences of less than a day did not defeat the exemption (except in a workweek in which deduction was made). See, e.g., Atlanta Professional Firefighters Union v. Atlanta, 920 F. 2d 800 (11th Cir. 1991); Harris v. District of Columbia, 709 F. Supp. 238 (D.D.C. 1989); and D.C. Nurses Assn. v. District of Columbia, 29 WH Cases 868 (D.D.C. 1988). Some courts have also allowed application of the "correction" provisions at 29 CFR 541.118(a)(6) to preserve exempt status in cases where the public employer made "inadvertent" deductions from pay for absences of less than a day when leave was exhausted, reimbursed the affected employee for such *45829 deductions, and promised future compliance. See, e.g., Hartman v. Arlington County, Va., 720 F. Supp. 1227 (E.D. Va. 1989), aff'd, 903 F. 2d 290 (4th Cir. 1990); Fire Fighters Local 2141 v. City of Alexandria, Va., 720 F. Supp. 1230 (E.D. Va. 1989), aff'd, 912 F. 2d 463 (4th Cir. 1990); Harkins v. City of Chesapeake, 29 WH Cases 1399 (E.D. Va. 1988); Chadwick v. City of Norfolk, Va., 29 WH Cases 1407 (E.D. Va. 1988); and Sarver v. City of Roanoke, Va., 29 WH Cases 1442 (W.D. Va. 1989).

The Department has been considering (and continues to consider) a variety of possible changes to the regulations governing the exemption for bona fide executive,

administrative, and professional employees, including the particular requirements in the public sector affecting how employees may be paid on a salary basis. (Interim final regulations implementing a special "salary basis" rule for public sector employers are being published separately this date in the Federal Register, to be codified at 29 CFR 541.5d.)

In the meantime, these diverging judicial interpretations and accompanying confusion have developed, resulting in the exposure of governmental employers to potentially enormous and generally unexpected back wage liabilities to employees, some of whom would clearly be exempt if duties and amount of compensation alone were examined. The payment of such unforeseen liabilities could seriously threaten the fiscal integrity of State and local governmental agencies, and could seriously disrupt widespread pay practices which were designed and intended to serve the public trust and were established long before State and local government employees were subject to the Fair Labor Standards Act.

For these reasons the Department is of the view that public sector pay systems must be analyzed differently from, because they are significantly distinguishable from, private sector pay systems. In the Department's judgment, certain aspects of the existing "salary basis" regulatory requirement for exemption are unduly restrictive when applied in the public sector. State and local governments are thus inappropriately deprived of the opportunity to apply the section 13(a)(1) exemption to their employees who would otherwise be bona fide exempt.

While the Department is continuing its overall review of the full range of issues raised by the public comments submitted on its advance notice of proposed rulemaking of November 19, 1985 (50 FR 47696), it is undertaking this separate rulemaking proposal on the specific issue of measures that could be taken by public employers to restore the exempt status of public employees who would otherwise have been exempt but for pay systems calling for deductions (i.e., where no actual deductions are made and where actual deductions made are reimbursed) inconsistent with the "on a salary basis" requirement for public sector employees.

This proposal would operate in conjunction with the Department's newly-published interim final rule regarding salary basis in the public sector. (See the interim final rule published separately this date in the Federal Register, at 29 CFR 541.5d.) The proposal would, in essence, provide that employees previously subject to deductions under a pay system that now passes muster under s 541.5d, and, with respect to whom actual deductions have been reimbursed, shall be restored to exempt status under s 541.118(a)(6). As with the existing s 541.118(a)(6), this provision deals with a situation which has arisen unexpectedly when some parts, but not all essential parts, of the regulatory requirements for exemption have been met with respect to public sector employees. Unlike the existing s 541.118(a)(6), which deals primarily with occasional "inadvertent" deductions from the pay of employees who are generally paid in a "salary basis" structure, this provision would deal with the effect of past deductions made by virtue of a pay system that may

otherwise have resulted in a complete disallowance of the exemption.

The Department seeks comments on all aspects of this proposal, in particular drawing the attention of commenters to legal and other considerations regarding: (1) The retroactive aspects of the proposal; and (2) the fairness of the proposal, both to employers and employees.

II. Paperwork Reduction Act

This regulation contains no reporting or recordkeeping requirements.

III. Summary of the Rule

The rule provides that eligibility for the exemption under the requirement that employees be paid "on a salary basis" will not be defeated in the case of governmental entities that either: (1) Made no deductions from pay for absences of less than one work-day before the effective date of new regulations promulgated at 29 CFR 541.5d (i.e., September 6, 1991), or (2) reimburse otherwise-exempt public employees for deductions from pay made for absences, for personal reasons or because of illness or injury, of less than one work-day that occurred before the effective date of s 541.5d.

Executive Order 12291

DEPARTMENT OF LABOR

Employment Standards Administration Wage and Hour Division

29 CFR Part 541

RIN 1215-AA77

Exemptions From Minimum Wage and Overtime Compensation Requirements of the Fair Labor Standards Act; Public Sector Employers

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: This document provides revised final Regulations, 29 CFR part 541, governing the criteria for exemption from the minimum wage and overtime compensation requirements of the Fair Labor Standards Act ("FLSA" or "Act") for public sector employees employed in *bona fide* executive, administrative, and professional capacities. A special, limited exception from the exemption's requirement for payment "on a salary basis" is provided for certain public sector pay systems that reduce the pay of otherwise-exempt employees for partial-day absences when paid leave is not used to cover such absences, and for deductions due to budget-required furloughs.

EFFECTIVE DATE: September 18, 1992.

FOR FURTHER INFORMATION CONTACT: J. Dean Speer, Director, Division of Policy and Analysis, Wage

and Hour Division, Employment Standards Administration, U.S. Department of Labor, room S-3506, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 523-8412 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act

This regulation contains no reporting or recordkeeping requirements subject to the Paperwork Reduction Act.

II. Background

A. Summary of Statutory and Regulatory Provisions

The FLSA (29 U.S.C. 201, *et seq.*) requires that covered, non-exempt employees receive not less than the Federal minimum wage for all hours worked and overtime premium pay (at one-and-one-half times the regular rate of pay) for all hours worked over 40 in a workweek. Section 13(a)(1) of the Act (29 U.S.C. 213(a)(1)) provides a statutory exemption from these requirements for employees employed in a *bona fide* executive, administrative, or professional capacity, as follows:

Section 13. (a) The provisions of sections 6 (except section 6(d) in the case of paragraph (1) of this subsection) and 7 shall not apply with respect to –

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic

administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as much terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act * * *).

The scope of the exemption provided by Section 13(a)(1) of the FLSA is defined and explained in Department of Labor regulations, codified at 29 CFR part 541. The regulations generally require that, to be exempt, employees must meet specified regulatory standards with respect to their job duties and responsibilities, and be compensated "on a salary basis" at a level that is not less than the stated amounts.[1]

Employees whose terms and conditions of employment meet the stated exemption requirements need not be paid the FLSA minimum wage or overtime premium pay for hours worked over 40 per week.

The regulations defining "salary basis" (at § 541.118) provide that an employee will be considered to be paid "on a salary basis" if the employee regularly receives each pay period a predetermined amount constituting all

---

[1] The existing exemption criteria include specified duties and responsibilities tests, in addition to a salary requirement. To qualify, an employee must be paid a weekly salary of a least $155 as an executive or administrative employee, and $170 as a professional, and must meet all the other tests (the "long tests" for exemption). If such employees receive $250 (or more) in salary, a shorter, less-stringent duties test applies (the "short test" or "up set salary test"). Consideration of these compensation levels will be undertaken in connection with any further rulemaking.

or part of the employee's compensation and the predetermined amount is not subject to reduction because of variations in the quality or quantity of work performed. Subject to specified exceptions, the employee must receive the full salary for any week in which any work is performed without regard to the number of days or hours worked, subject also to the general rule that an employee need not be paid for any workweek in which no work is performed.

Deductions may not be made " * * * for absences occasioned by the employer or by the operating requirements of the business," such as "deductions * * * for time when work is not available" (§ 541.118(a)(1)). Deductions also may not be made for activities such as jury duty, attendance as a witness, or temporary military leave (§ 541.118(a)(4)).

Deductions may be made from an employee's predetermined compensation without invalidating the employee's salaried status when an employee is absent from work for a full day or more for personal reasons, other than sickness or accident, as provided in § 541.118(a)(2). Deductions are also permitted for absences of a day or more because of sickness or disability if the employer has a *bona fide* plan, policy or practice that provides compensation for loss of salary due to sickness and disability (§ 541.118(a)(3)). Deductions imposed "in good faith for infractions of safety rules of major significance" also will not affect an employee's salaried status (§ 541.118(a)(5)).

The regulations also state that the effect on the salaried status of an employee, and thus eligibility for

exemption, when an impermissible deduction is made will depend upon the facts in each case. This provision permits an employer who makes impermissible deductions from the predetermined compensation of an otherwise salaried employee to reimburse the employee for the deductions in certain circumstances, thereby restoring the exempt status of the employee. In particular, § 541.118(a)(6) provides:

(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable * * * during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

The salary requirement has been an integral part of the 541 regulations since 1940. The existing regulatory interpretation of "salary basis" dates back to 1954 (19 FR 4405; July 17, 1954). These provisions were developed from extensive hearings and record evidence showing that executive, administrative, and professional employees employed in industries then subject to the FLSA, which excluded governmental employers, were nearly universally paid on a salary basis. Employers not compensating on a salary basis have had ample opportunity to conform their pay practices to the requirements

if they chose to claim exemption for their employees, or pay overtime premium pay. In contrast, the public sector pay policies at issue in this rulemaking evolved over the years subject to constraints in statutes, ordinances or policies based on public accountability principles that preclude paying public employees for hours not worked, under systems that regarded management employees as being exempt from overtime.

* * *

Salary Basis

[December 24, 1991]

You will recall that at your ___ meeting last summer, I promised to provide your organization with an explanation of the effect of disciplinary deductions under Regulations, 29 CFR Part 541. I regret the delay in providing this information but think that you will still find it useful.

As I explained in my remarks, the only deductions which may be made from an employee's compensation without affecting the "salary basis" of payment are found in §§ 541.118(a)(2), (3), and (5) of the Regulations (copy enclosed). The only discipline-related deduction permissible is one imposed as a penalty "in good faith for infractions of safety rules of major significance." As explained in § 541.118(a)(5), safety rules of major significance embrace those intended to prevent serious danger to the facility or other employees, including prohibitions against smoking in explosive plants, oil refineries, and coal mines. The Department of Labor has also construed this language to cover penalties imposed for violations of industrial security regulations promulgated by the Department of Defense.

The effect of making impermissible disciplinary deductions from "salaried" employees is discussed in § 541.118(6). Where a one-time disciplinary deduction is made, the exemption will not be considered to have been lost in all workweeks *if* the employer reimburses the employee for such deduction *and* agrees to not take any such impermissible deduction in the future. Where disciplinary deductions not permitted by the Regulations occur on a regular and recurring basis (e.g., because of an

employer's policy), we would question whether such employees, including all of those in the "class" or "category" of employees affected by such deductions, are actually paid on a salary basis and the exemption may be denied in *all* workweeks.

I would again emphasize that these rules are not intended, and should certainly not be construed, to prevent employers from taking appropriate disciplinary action with respect to their employees. Rather, these rules effect a longstanding interpretation of employment practices that typically distinguish those employees who are paid "on a salary basis" from those who are not. That is to say that those employees who are paid "on a salary basis" are not generally subject to disciplinary action that results in deductions from their salary, but are and can be appropriately disciplined in other ways.

I trust that the above discussion fulfills my commitment. Please let me know if you have any further questions in this matter.

[Opinion signed by Acting Wage Hour Administrator John R. Fraser, December 24, 1991]

Sec. 42-28. Power to fine officers.

The manager of safety shall have the power to fine any police officer, member or employee for any misconduct or breach of discipline or violation of the rules and regulations of the police department and to collect the same or cause it to be withheld from any amount that is or may become due such person.

(Code 1950, § 211.14-1)

SEC. 42-63(b)(1)

The provisions of this paragraph (b) shall not apply to police officers determined to be exempt from the Fair Labor Standards Act and who hold the rank of lieutenants of police, superintendent of radio engineers, division chief or captains of police, as fixed by Charter provision.

FILED
JUL 31 1996
CLERK

No. 95-2088

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CITY AND COUNTY OF DENVER,
Petitioner,

v.

C. KELLEY CARPENTER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Are police officers who work under both a charter and ordinance that expressly provide that they are subject to fine and/or suspension for violation of any departmental rule, who have been regularly fined the loss of accumulated leave, who have been suspended for less than a work period for violations of rules which are not safety rules of a major significance and who have other indicia of being hourly employees eligible for the executive or administrative exemptions to the overtime requirements of the Fair Labor Standards Act?

2. Is the "window of correction" provided for by 29 C.F.R. § 541.118(a)(6) available where there are charter and ordinance provisions establishing a rule for discipline for violations of rules other than safety rules of a major significance and where there are other indicia of the employees being paid hourly?

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IN THE

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OCTOBER TERM, 1996

No. 95-2088

CITY AND COUNTY OF DENVER,
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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

There are key factual differences between this case and *Auer v. Robbins*, No. 95-897, in which this Court has granted a Petition for Certiorari on similar issues. One distinction is the existence of an express written rule found in both Denver's Charter and Revised Municipal Code subjecting all Denver police officers, regardless of rank, to fines and/or suspensions for violation of any departmental rule. Denver's use of disciplinary fines of accumulated leave days and suspensions for violations of

rules other than safety rules of major significance shows that the rule also exists as a matter of practice. Other differences include being paid, pursuant to ordinance, additional straight time for overtime hours worked and being subject to loss of pay for military leave in excess of 14 days per year.

The "window of correction" provisions of the Department of Labor regulations require, among other things, that the correction include a promise to comply in the future. Where there are express rules set forth in charter and ordinance, it is impossible to promise to comply in the future because such a promise is directly contrary to those rules. Therefore, the "window of correction" regulation is not available to Denver. Additionally, the other indicia of being hourly paid make the "window of correction" regulation irrelevant to this dispute.

ARGUMENT

I. THERE ARE SIGNIFICANT AND MATERIAL DIFFERENCES BETWEEN THIS CASE AND THE CASE CURRENTLY PENDING BEFORE THIS COURT ON SIMILAR ISSUES WHICH ARGUE AGAINST THIS PETITION FOR CERTIORARI

On June 24, 1996, one week before the Petition was filed in this matter, this Court granted a Petition for Certiorari in *Auer v. Robbins*, No. 95-897. *Auer* raises the same two issues presented by the Petitioner in this case.[1] There is a significant and material difference between the

[1] Petitioner's characterization of the first issue, which states that the employees are "otherwise exempt from the overtime requirements of the Fair Labor Standards Act," is inaccurate. As noted by the Tenth Circuit, it did not discuss Respondents' claims that the military leave and jury duty policies of the Petitioner also precluded a finding of exemption. *Carpenter v. City and County of Denver*, 82 F.3d 353, 356 (10th Cir. 1996). For at least some Respondents there are also issues of whether they meet the job duties test for obtaining exempt status. *Id.*

facts of *Auer* and this case. In *Auer*, the disciplinary rule was part of the rules and regulations of the police department. In Denver, the rule is found both in the Charter adopted by the citizens and in the Municipal Code adopted by the City Council. Section C5.73 of the Charter (Appendix 1a) provides that the rules governing the conduct of members of the police department must be in writing and must be approved by the manager of safety, a civilian official ultimately in charge of both police and fire departments. The section goes on to say, "*Any member* of the classified service shall be subject to reprimand, discharge, reduction in grade, *fine and/or suspension* for a violation of such rules and regulations." *Id.* (Emphasis added.) The Charter provision is further refined and explained in Section 42-28 of the Municipal Code (Appendix 2a) which provides that the manager of safety has the power to fine a police officer for "any misconduct" or "violation of rules and regulations of the police department" and additionally to collect the fine or "cause it to be withheld from any amount that is or may become due such person." *Id.*

In *Auer*, the single disciplinary suspension was not done pursuant to the City's rule. 65 F.3d 702, 711 (8th Cir. 1995). In this case, Denver has suspended two lieutenants and has regularly fined Respondents with the loss of accumulated leave days. 82 F.3d 358.[2] These disciplinary penalties have been imposed pursuant to the express rules quoted above. For this reason alone, resolving the issue of whether an *unimplemented* rule subjecting employees to discipline causes the loss of salaried status will not impact this case.

There is also no split in the circuits over whether salaried status is lost where there is an express and implemented disciplinary rule. In circuits which have held

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[2] Such fines are "penalties" as that term is used in 29 C.F.R. 541.118(a) (5).

employees to be salaried there was either no rule, *York v. City of Wichita Falls*, 944 F.2d 236, 242 (5th Cir. 1991); *Barner v. City of Novato*, 17 F.3d 1256, 1262 (9th Cir. 1994); *McDonnell v. City of Omaha*, 999 F.2d 293 (8th Cir. 1993); *Michigan Ass'n of Governmental Employees v. Michigan Dept. of Corrections*, 992 F.2d 82, 86 (6th Cir. 1993), or an unimplemented one. *Atlanta Professional Firefighters Local 134 v. Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991). Subsequently, in *Avery v. City of Talladega*, 24 F.3d 1337, 1342 (11th Cir. 1994) the Eleventh Circuit held that if an express rule has actually been applied to a member of a rank claimed to be exempt, then not only that member but all members of that rank are ineligible for exempt status. Conversely, whenever there has been both an express rule and its implementation, salaried status is lost. *Klein v. Rush-Presbyterian-St. Lukes Med. Ctr.*, 990 F.2d 279, 284-87 (7th Cir. 1993); *Hurley v. Oregon*, 27 F.3d 392, 394 (9th Cir. 1994).[3]

Although not relied upon by the Tenth Circuit, there are other indicia that Respondents are hourly paid in this case. Section 42-63(d) of the Denver Municipal Code (Appendix 2a) provides that Respondents are entitled to overtime compensation in either compensatory time or cash for hours worked in excess of eight in one day at straight time. Denver also has an express rule that stops paying any police officer, regardless of rank, after 14 days of military leave in one year. Both of these facts show how Respondents are not salaried employees. *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990) (overtime pay); *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d

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[3] There are circuits that hold the existence of an express rule alone is enough to lose salaried status. *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990); *Mueller v. Reich*, 54 F.3d 438 (7th Cir. 1995); *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993); *Yourman v. Dinkins*, 84 F.3d 655 (2nd Cir. 1996).

611 (2nd Cir. 1991);[4] and 29 C.F.R. § 541.118(a)(4) (temporary military leave). (Appendix 3a).

II. THE WINDOW OF CORRECTION CONCEPT ALLOWED UNDER 29 C.F.R. § 541.118(a)(6) DOES NOT APPLY IN THE FACE OF AN EXPRESS RULE OF DISCIPLINE OR DOCKING

Only two circuits have expressly commented on the application of the "window of correction" regulation where an express rule concerning discipline or docking exists; *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 617 (2nd Cir. 1991); *Auer, supra*, 65 F.3d at 711, and both have held that the regulation cannot be applied. Such holdings are clearly correct given the language of the regulation. An employer may take advantage of the "window of correction" only if it "reimburses the employee for such deductions *and promises to comply in the future.*" 29 C.F.R. § 541.118(a)(6). (Emphasis added). An employer cannot promise to ignore its own express rules, particularly where those rules are set forth in a charter adopted by the people and/or an ordinance adopted by the legislative body. Even if the regulation could apply in the face of an express policy, the other indicia of hourly pay in this case makes such a conclusion irrelevant.

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[4] There are two cases holding that receipt of overtime is insufficient to cause the loss of salaried status, *Aaron v. City of Wichita*, 54 F.3d 352 (10th Cir. 1995); *Hilbert v. District of Columbia*, 23 F.3d 429 (D.C. Cir. 1994). In neither of these cases, however, was there also an express rule concerning discipline.

CONCLUSION

The existence of express and implemented rules in both charter and ordinance relating to discipline makes the Tenth Circuit's decision correct and consistent with all circuit court decisions that have faced this precise issue. This Court's decision in *Auer* should not question the propriety of the result in this case. There is no split of authority in the circuits over whether the window of correction can apply where there is an express disciplinary rule applicable to the employees in question. Additionally, the "window of correction" regulation is irrelevant in this case. For these reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX

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Denver City Charter

C5.73 Departmental disciplinary procedure. The rules governing the conduct of members of the classified service in the Fire and Police Departments shall be set forth as written rules and regulations by the chief of each of the respective departments with the approval of the Manager of Safety, provided, however, that such rules and regulations shall not contain any political or religious qualifications or disqualifications. Any member of the classified service shall be subject to reprimand, discharge, reduction in grade, fine and/or suspension for a violation of such rules and regulations.

Denver Revised Municipal Code

Sec. 42-28. Power to Fine Officers.

The manager of safety shall have the power to fine any police officer, member or employee for any misconduct or breach of discipline or violation of the rules and regulations of the police department and to collect the same or cause it to be withheld from any amount that is or may become due such person.

Sec. 42-63. Overtime pay; days off.

(d) In addition to the annual salaries as fixed by ordinance and longevity pay for members in the classified service of the police department of the rank of lieutenants of police, superintendent of radio engineers, division chief or captains of police, as fixed by Charter provisions, who are also determined to be exempt from the Fair Labor Standards Act, hours of active duty assigned to and performed by such member of the classified service of the police department in excess of eight (8) hours in any day (from midnight to the next midnight) or ten (10) hours in any day (from midnight to the next midnight) if the officer is normally scheduled to work ten-hour shifts, as certified by the member's immediate superior officer, shall be compensated by allowance of equal time off within three (3) months after performance of such extra hours of active duty or, if approved by the chief of police, by payment of salary within the three (3) months, for extra hours of active duty, such regular hourly rate of pay to be computed by dividing by two thousand (2,000) the annual rate of salary of such member, including longevity pay, at the time of the performance of such extra duty. Payments for extra hours of duty shall not be considered or included in determining or computing the pension or retirement benefits of members of the police department retired or retiring before, on, or after October 1, 1985.

29 C.F.R. Sec. 541.118 Salary basis.

(a)(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against salary due for that particular week without loss of the exemption.

95-2088 (3)

Supreme Court, U.S.
FILED
AUG 8 1996
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No. 95-2008

In The

Supreme Court of the United States

October Term, 1995

CITY AND COUNTY OF DENVER,

Petitioner,

v.

C. KELLY CARPENTER, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

On June 28, 1996 the City and County of Denver (hereinafter "Denver") filed its Petition for Writ of Certiorari. After filing its Petition Denver learned that on June 24, 1996 this Court granted the Petition for Writ of Certiorari in *Auer v. Robbins*, 65 F.3d 702 (8th Cir. 1995), *cert. granted*, 64 USLW 3854 (US June 24, 1996) (No. 95-897).

The issues raised in Denver's Petition are substantially similar to those in *Auer v. Robbins*. Both cases involve interpretations of two of the United States Department of Labor's regulations: 1) its "salary basis" regulation (29 CFR § 541.118(a)), pertaining to whether an exempt employee's pay is "subject to reduction" based upon the mere possibility of a deduction, and 2) its "window of correction" regulation, 29 CFR § 541.118(a)(6). Thus, the Respondent's Brief in Opposition correctly states that "*Auer* raises the same two issues presented by the Petitioner in this case." (*Id.* at 2.)

I.

The Brief in Opposition is inaccurate in contending that *Auer* and the present case involve "key factual differences." *Auer*, like the present case, involves the primary issue of whether a mere "contingent possibility" of a deduction in salary defeats exempt status. *Id.* at 710. In *Auer* a one time, two-day deduction from the salary of one exempt employee (Sergeant Guzy) occurred as discipline for violation of St. Louis' residency requirement. *Id.* Sergeant Guzy, in lieu of possible termination, settled with the City, agreeing to waive his right to a hearing and to accept a two-day suspension without pay.

Contrary to the Respondent's contention, the disciplinary suspension in *Auer* was initiated pursuant to a City rule. As noted in the Petition for Writ of Certiorari in

Auer, the St. Louis Police Manual provided various penalties, including disciplinary suspension, which the plaintiffs were subject to.

In *Auer* the Eighth Circuit held that a one-time deduction "does not automatically require the determination that all sergeants are non-salaried." *Id.* at 710. It concluded that a one-time deduction, under the circumstances of the case, did not make that occurrence "pursuant to an established policy." *Id.* at 711.

Like *Auer*, in the present case the Tenth Circuit found that a disciplinary suspension had only occurred once, in the case of Lieutenant Dale Canino. *Carpenter v. City and County of Denver, Colorado*, 82 F.3d 353, 358 (10th Cir. 1986)[1]. However, as noted in the Appellee's Petition for Rehearing (pgs 13-14) Lieutenant Canino served a suspension, but only at the *non-exempt* rank of sergeant. Whether a disciplinary suspension of an exempt Denver employee never occurred, or occurred but once, there is no evidence that Denver had an express policy or a practice of docking pay, rather than accumulated leave.

In *Auer* and the present case, both Sergeant Guzy and Lieutenant Canino settled their personnel matters. Lieutenant Canino, as part of a settlement, accepted a sixty day suspension, in lieu of demotion, for falsifying time records. He also waived his right to bring any claims under the FLSA, by releasing and waiving all other causes of action "arising directly and indirectly from the administration of discipline in this case." Had voluntary settlements not occurred in Lieutenant Canino and Sergeant Guzy's cases, both would have unquestionably been considered at all times to have been salaried,

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[1] The only other discipline discussed in the *Carpenter* decision was that of Lieutenant Buckley Stewart who was suspended with pay. *Id.* at 358.

exempt employees, and neither St. Louis nor Denver would have suspended any exempt employee without pay.

Thus, as detailed above *Auer* and the present case are substantively indistinguishable.

The Respondents' contention that the courts of appeals are not split over whether salaried status is lost "where there is an express and implemented disciplinary rule" is incorrect, and misidentifies the basis upon which the split in the circuits has occurred. The split exists between those circuits, like the Eighth Circuit in *Auer*, which held that salary is not subject to reduction based upon the "mere possibility" or "contingent possibility" of reduction (*Id.* at 710), and those circuits, like the Tenth Circuit, which have ruled that such a possibility is sufficient. That issue is one of the primary issues presented in the Petition for Writ of Certiorari filed in *Auer*.

The Tenth Circuit's decision in *Carpenter* was premised on its conclusion that Denver's policy of "removing leave time from the officers' leave repository creates the potential for reducing pay." *Id.* at 359. It did not base its determination on the presence or absence of an express policy.

The Ninth Circuit's decision in *Barner v. City of Novato*, 17 F.3d 1256 (9th Cir. 1994), involved an "informal city policy" of either deducting employee absences of less than one day from unused leave time, or if the leave was exhausted, to leave to the city manager's discretion what to do. *Id.* at 1258. Thus, the City of Novato required two eventualities to occur before employee pay would be reduced.

The Ninth Circuit held that neither the possibility of reducing pay, nor the city's policy of reducing accrued paid leave for absences of less than one day, resulted in the plaintiffs' status being altered to that of hourly employees. *Id.* at 1261-1262. It further held that in the

absence of an express policy of subjecting "pay to reduction for absences of less than one day, deducting accrued leave time is not conduct which puts the employee outside the applicable exemption." *Id.* at 1258.

Denver notes that neither the City of Navoto, nor Denver, have an express policy of subjecting pay to reduction. Based upon the Respondents' thesis that the presence or absence of an express rule explains the outcome of the Courts of Appeals' decisions, the Tenth Circuit should have ruled in Denver's favor.

The Respondents also incorrectly contend that *Michigan Ass'n of Governmental Employees v. Michigan Dept. of Corrections*, 992 F.2d 82 (6th Cir. 1993), involved no rule. However, a sick leave rule relied upon by the plaintiffs in that case provided that once leave credits and compensatory time were exhausted, their compensation was subject to reduction for absences of less than one day. *Id.* at 84. Denver again notes that the Sixth Circuit's ruling was not based upon whether an express or unimplemented policy existed.

Similarly, the Respondents' premise as to the decisions in *Atlanta Professional Firefighters Local 134 v. Atlanta*, 920 F.2d 800 (11th Cir. 1991), and *McDonnell v. City of Omaha*, 999 F.2d 293 (8th Cir. 1993) is unavailing. The Eighth and Eleventh Circuits' rulings that exempt status was not lost turned on the absence of an actual loss of pay, rather than the issue of the presence or absence of an express or "unimplemented" rule.

II.

Both *Auer* and Denver's Petition raise the issue of whether the "window of correction" (29 CFR § 541.118(a)(6)) is available "for reasons other than lack of work". In *Auer* the Court held, that under the circumstances, it was, and that pursuant to the regulation, an

employer need only "reimburse the employee for the lost wages." *Id.* at 711. Thus, because the circumstances in *Auer* and this case closely parallel each other, reimbursement, pursuant to 29 CFR § 541.118(a)(6), would be a simple matter of paying at most one employee for his lost wages.[2]

The Respondents do not contest Denver's interpretation of the express language of the rule, but instead argue that Denver cannot "refuse to comply in the future" because it "cannot promise to ignore its own express policy". The Respondents' contention, however, ignores the fact that such a promise made by Denver would simply be a promise to *continue* its actual practice, which has never resulted in a loss of pay to any exempt employee.

CONCLUSION

For the reasons stated in Denver's Petition for Writ of Certiorari, and because that Petition involves substantially similar issues and factual circumstances to those in *Auer*, the Petition should be granted.

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[2] As noted above, Denver contends that the Tenth Circuit erred in finding that Lieutenant Canino received a suspension as an exempt employee.